TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 699 27

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1944
CERTIORARI GRANTED MARCH 27, 1944

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 2704.

L. METCALFE WALLING, Administrator of the Wage and Hour Division of the United States Department of Labor, APPELLANT,

vs.

HELMERICH & PAYNE, INC., APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

FILED FEBRUARY 26, 1943.

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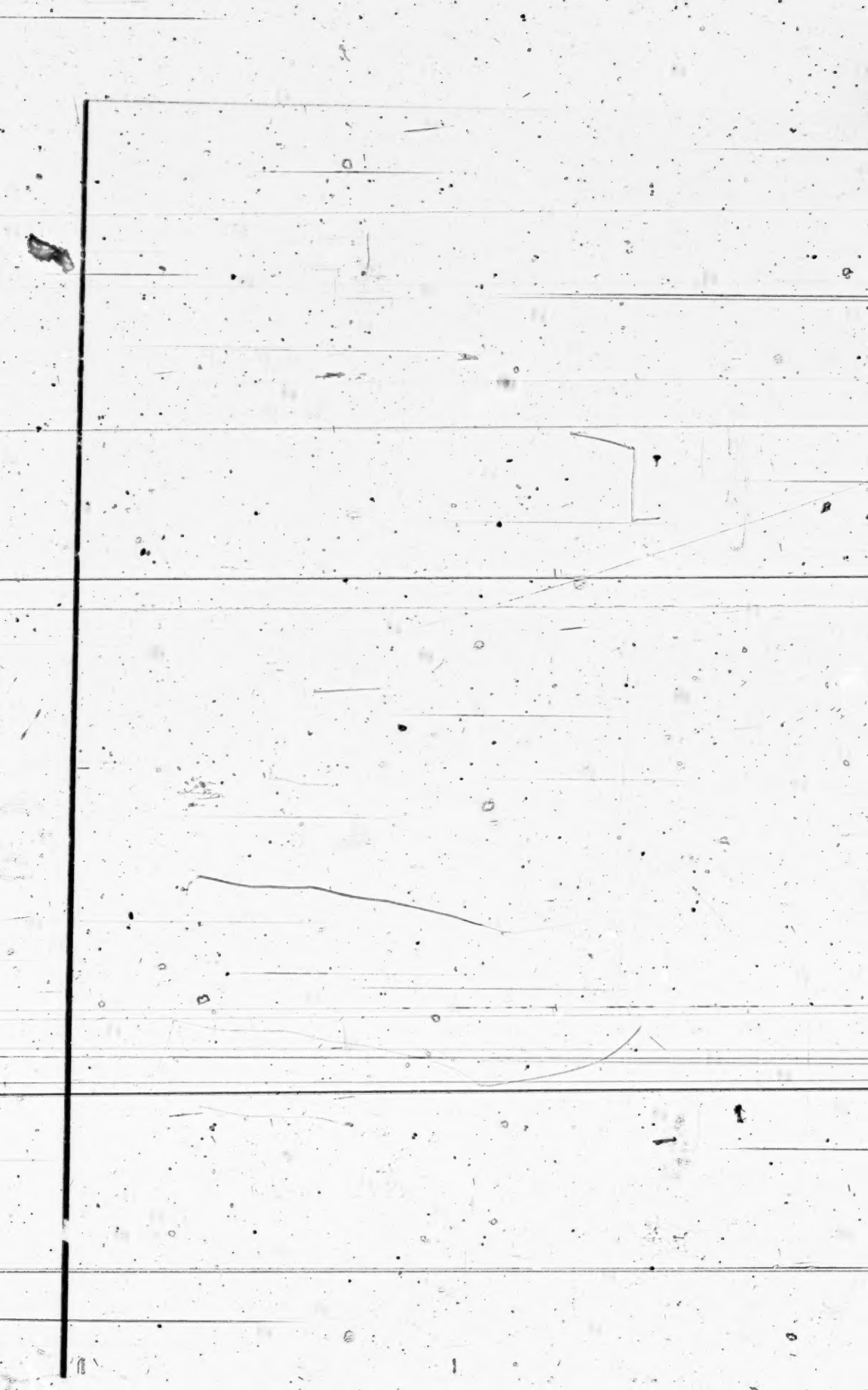
Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the September term, 1943, of said Court, before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Walter A. Huxman, Circuit Judges.

On the 26th day of February A. D. 1943, a transcript of the record, pursuant to a notice of appeal, filed in the District Court of the United States for the Northern District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, was appellant, and Helmerich & Payne, Inc., was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:



IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 2704.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, APPELLANT,

vs.

HELMERICH & PAYNE, INC., APPELLEE.

Statement of Points to be Relied Upon by Appellant.

Appellant, L. Metcalfe Walling, as required by Rule 13 of the Rules of this Court, states the points on which he intends to rely, as follows:

1. The district court erred in ruling that the employees employed by the appellee pursuant to the contracts set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein have been employed in compliance with the requirements of Section 7 of the Fair Labor Standards Act of 1938.

2. The district court erred in ruling that the employment and compensation by appellee of employees pursuant to the contracts set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein come within the decision of the Supreme Court in Walling v. Belo Corporation, 316 U. S. 624, 62 Sup. Ct. 1223.

3. The district court erred in failing to find and rule that the employment and compensation by appellee of employees pursuant to the contracts set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein violated Section 7 of the Fair Labor Standards Act of 1938.

4. The district court erred in failing to issue an injunction as prayed for enjoining the violation by the appellee of Sections 15(a)(1), 15(a)(2), and 15(a)(5) by reason of its employment and compensation of employees pursuant

to the contracts set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein.

IRVING J. LEVY, Acting Solicitor,
BESSIE MARGOLIN, Assistant Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
United States Department of Labor.

Filed February 26, 1943. Robert B. Cartwright, Clerk.

Appellant's Statement of Parts of Record Necessary for Consideration on Appeal.

Appellant, L. Metcalfe Walling, pursuant to Rule 13 of the Rules of this Court, states that the parts of the record necessary for consideration on appeal are as follows:

1. Appellant's complaint.

2. Appellee's answer.

3. Stipulation of fact executed by the parties and filed and introduced in evidence at the trial, including copies of the exhibits attached thereto.

4. Complete stenographic transcript of proceedings and evidence had and taken before the Honorable Royce H. Savage, United States District Judge, on May 13, 1942, including a copy of Plaintiff's Exhibit No. 1.

5. A copy of the final judgment entered by the District Court.

6. A copy of the findings of fact and conclusions of law filed by the District Court.

7. Notice of appeal, with date of filing.

8. The designation of record filed in the District Court, with date of filing.

9. Affidavit of service of designation of record and of statement of points to be relied upon on appeal, filed in the District Court.

IRVING J. LEVY, Acting Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
BESSIE MARGOLIN, Assistant Solicitor,
United States Department of Labor.

Filed February 26, 1943. Robert B. Cartwright, Clerk.

Robert B. Cartwright, Clerk United States Circuit Court of Appeals for the Tenth Circuit, Denver, Colorado.

Dear Sir: Re: Walling v. Helmerich and Payne, Inc., C.C.A. 10, No. 2704.

I am writing you in response to your recent letter addressed to Mr. Duke, our regional attorney at Dallas, Texas, inquiring whether we desire to include in the printed record in the above case Exhibit A attached to the complaint. That exhibit consists of a copy of Regulations, Part 516.

Please be advised that it will not be necessary to include that exhibit in the printed record.

I am sending a copy of this letter to Mr. Monnet.

Very truly yours,

BESSIE MARGOLIN, Assistant Solicitor.

[Telegram.]

DA448 56 Govt-Dallas Tex 9 312P

Robert B *Cargwright*, Clerk, United States *Circupt* Court of Appeals DVR Re Walling versus Helmerich and Payne No. Twenty Seven ~~Naught~~ Four.

You need not print Exhibit "N" in record. We desire to designate in record and have printed the order substituting Walling for Holland. This designation appeared in papers we filed with clerk of trial court and has evidently been omitted from record sent your office.

LLEWELLYN B DUKE U S Dept of Labor.

Filed March 9, 1943. Robert B. Cartwright, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE ROYCE H. SAVAGE, UNITED STATES DISTRICT JUDGE, IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE, TO-WIT:

L. METCALFE WALLING, Administrator of the Wage and Hour Division of the United States Department of Labor, PLAINTIFF,

vs.

No. 568 Civil

HELMERICH & PAYNE, INC., DEFENDANT.

Complaint.

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Delaware. Its principal place of business is located at 415 Philtower Building, Tulsa, Oklahoma, within the jurisdiction of this court. It has numerous and divers other places of business within and outside the state

of Oklahoma. It is, and at all times hereinafter mentioned was, engaged at its said places of business in the said City of Tulsa, Oklahoma, and elsewhere, in the production, sale and distribution of crude oil and other petroliferous substances, and in processes and occupations necessary to such production, sale and distribution. Its resident agent, authorized to accept service in Oklahoma, is W. H. Helmerich, 415 Philtower Building, Tulsa, Oklahoma.

IV.

3 At all times hereinafter mentioned, defendant employed and is employing approximately 499 employees in and about its said places of business in Tulsa, Oklahoma, and elsewhere, in the production of oil and other petroliferous substances and in processes and occupations necessary to such production. Substantial quantities of casing, machinery, equipment and supplies used in such production and in such processes and occupations necessary to such production are purchased and transported in interstate commerce from and through states other than the State of Oklahoma to the said places of business in the State of Oklahoma and elsewhere, and substantially all of the goods produced by the said employees in the said places of business, and goods produced by employees engaged in processes and occupations necessary to the production of said goods, have been and are being produced for interstate commerce and have been and are being sold, transported, shipped and delivered in interstate commerce from the said places of business to, into, and through States other than those States in which such places of business may be located.

V.

During the period beginning October 24, 1938, the effective date of Section 7(a)(1) of the Act, and repeatedly thereafter through October 23, 1939, defendant employed many of its aforesaid employees, who were engaged in the production of goods for interstate commerce, and in processes and occupations necessary to such production, as aforesaid, for workweeks longer than forty four (44) hours, and did fail and refuse to compensate the said employees for their

employment in excess of forty-four (44) hours in such workweek at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1939, the effective date of Section 7(a)(2) of the Act, and repeatedly thereafter through October 23, 1940, defendant employed many of its aforesaid employees, who were engaged in the production of goods for interstate commerce, and in processes and occupations necessary to such production, as aforesaid, for workweeks longer than forty-two (42) hours; and did fail and refuse to compensate the said employees for their employment in excess of forty-two (42) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, did fail and refuse to compensate them for such excess hours at any rates greater than the regular rates at which they were employed; and, during the period beginning October 24, 1940, the effective date of Section 7(a)(3) of the Act, and repeatedly thereafter, defendant has employed many of its aforesaid employees, who were engaged in the production of goods for interstate commerce, and in processes and occupations necessary to such production, as aforesaid, for workweeks longer than forty (40) hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, and, in fact, has failed and refused to compensate them for such excess hours at any rates greater than the regular rates at which they were employed. By employing the said employees for workweeks in excess of the said hours during the said periods without compensating them for their employment in excess of the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, defendant has violated and is violating the provisions of Section 7 and 15(a)(2) of the Act.

VI.

During the period beginning on or about October 24, 1938, and repeatedly thereafter, defendant has sold, shipped,

delivered, transported, and offered for transportation in interstate commerce from its said places of business in Oklahoma, to, into and through states other than the state of Oklahoma, goods produced in the said places of business in the production of which, and in the processes and occupations necessary to the production of which many of its employees were employed in violation *in violation* of Section 7 of the Act, as alleged in Paragraph V hereof. By selling, shipping, delivering, transporting, and offering for transportation in interstate commerce, as aforesaid, the said goods so produced, defendant has violated and is violating the provisions of Section 15(a)(1) of the Act.

VII.

During the period beginning on or about October 24, 1938, and repeatedly thereafter, defendant has shipped, delivered, and sold, with knowledge that shipment, delivery and sale thereof in interstate commerce from points within the State of Oklahoma to, into and through other States was intended, goods produced in its said places of business in Oklahoma, in the production of which, and in the processes and occupations necessary to production of which, many of its employees were employed in violation of Section 7 of the Act, as alleged in Paragraph V hereof. By selling, shipping, and delivering, with knowledge that shipment, delivery, and sale thereof in interstate commerce, as aforesaid, was intended, the said goods so produced, defendant has violated and is violating the provisions of Section 15(a)(1) of the Act.

VIII.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provisions of the Act. The said regulations, and amendments thereto, were published in the Federal Register

and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516. A copy of the said regulations, as amended, is attached hereto, made a part hereof and marked "Exhibit A."

IX.

During the period beginning October 24, 1938, and repeatedly thereafter, defendant, an employer subject to the provisions of the Act and to the regulations referred to in Paragraph VIII hereof, has failed and refused to make, keep and preserve, as prescribed by said regulations, adequate records of the persons employed by it and of the wages, hours and other conditions and practices of employment maintained by it, in that the records made, kept and preserved by the defendant fail to show, adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay and the basis upon which wages are paid; the wages at the regular rate of pay for each workweek (excluding extra compensation *attributable* to the excess of the overtime rate over the regular rate), and the extra wages for each workweek attributable to the excess of the overtime rate over the regular rate, with respect to many of its said employees. By failing and refusing to make, keep, and preserve adequate records as prescribed by the said regulations defendant has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act.

X.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Act, both permanently and during the

pendancy of this action, and such other and further relief as may be necessary and appropriate.

GERARD D. REILLY, Solicitor.

IRVING J. LEVY, Assistant Solicitor in Charge of Litigation, Post Office Address: c/o Wage and Hour Division, U. S. Department of Labor, 824 Santa Fe Building, Dallas, Texas, or

LLEWELLYN B. DUKE, Regional Attorney, c/o Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

JOE H. MUNSTER, JR., Assistant Attorney, United States Department of Labor.
Attorneys for Plaintiff.

Endorsed: Filed (May 3, 1941). H. P. Warfield, Clerk, U. S. District Court.

Answer.

17 Comes Now the defendant, Helmerich & Payne, Inc., and for its answer to the Bill of Complaint of the plaintiff filed in the above entitled action, hereby denies each and every allegation therein contained except such allegations as may be hereinafter specifically admitted.

And for further answer said defendant alleges and states:

1. Defendant admits that it is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware since on or about February 6, 1940, with its principal office and place of business in the City of Tulsa, Oklahoma. That it carries on a general drilling contracting business in the Mid-Continent area of the United States, namely, in the States of Oklahoma, Texas, Kansas, New Mexico, Illinois and Nebraska, and, in carrying on said business, employes the following general classes of employees, to-wit:

A. Office employees, such as telephone girls, secretaries, stenographers, clerks, bookkeepers and assistant auditors.

B. Field employees, including rotary drillers, rotary helpers, derrick men, floor men and motor men and me-

chanics) cable tool drillers, tool dressers, truck drivers, swampers (truck drivers' helpers), lease pumpers, water pumpers and watchmen.

That the field men such as the rotary drillers, rotary helpers, cable tool drillers, tool dressers and water pumpers are employed by defendant in drilling wells for the exploration of oil and gas in the Mid-Continent area. That a large per cent of the wells so drilled are drilled and completed as dry holes and never produce articles of commerce, such as oil, gas, or otherwise.

That defendant's truck drivers are engaged in the miscellaneous and diversified business of transporting tools and equipment of defendant from place to place, sometimes wholly within a state, and sometimes from one state to another.

2. Defendant specifically denies that it has, since the effective date (October 23, 1938) of what is commonly known as the Federal Fair Labor Standards Act of 1938, been employing and paying its employees in violation of said Act, and specifically states and alleges that continually since and prior to said time it has been paying its said employees a regular or base hourly wage far in excess of thirty cents per hour for the first 40 hours worked in each work week, and one and one-half times said base or regular hourly wage for each hour worked thereafter in said week. It further specifically states and alleges that as of and from 12:01 o'clock A. M., July 16, 1941, it has been paying its said employees as above stated and in the manner and on a wage scale set forth in the copy of its general printed employment contract hereto attached, marked Exhibit "A" and made a part hereof.

Wherefore, said defendant prays that the relief prayed for in plaintiff's petition be denied and that defendant go hence with its costs.

SETTLE, MONNET & CLAMMER,
By EUGENE O. MONNET,
Attorneys for Defendant.

Exhibit A.

Helmerich & Payne, Inc., General Employment Contract.

Place..... Date.....

Helmerich & Payne, Inc.
415 Phillower,
Tulsa, Oklahoma

No. G 165

19 Gentlemen: I hereby accept employment with you as a ..... upon the following wage scale and conditions, to-wit:

1. The Base or Regular rate per hour for all classes of employees covered by this contract shall be paid for the first 40 hours worked in each calendar week and all hours in said week in excess of said 40 shall be paid for at one and one-half times said Base or Regular rate. Wages shall be paid bi-weekly (every 2 calendar weeks).

2. In the event any said bi-weekly compensation of any employee of the following classifications:

Truck Drivers	Classification 7	$80.80
Swampers	Classification 8	$74.00
Tandem Truck Drivers	Classification 9	$92.30

does not equal the sum hereinbefore set opposite the same, the company may advance and loan said employee the difference, which shall apply on future overtime payments; adjustments and accounting to be made on the first day of each year (or sooner in the company desires) and/or when said employment ceases.

3. Base or Regular hourly rates are as follows:

Classification 1 Rotary Driller	$1.33 1/3
Classification 2 Rotary Helper, except in Ill.	.82
Classification 3 Cable Driller	1.25
Classification 4 Tool Dresser	1.00
Classification 5 Rotary Helper in Illinois	.85
Classification 6 Roustabouts	.58
Classification 7 Truck Drivers	.46
Classification 8 Swampers	.42
Classification 9 Tandem Truck Drivers	.52

"Rotary Helper," under Classifications 2 and 5, shall mean and include Derrick Men, Floor Men, Motor Men and Mechanics.

4. Time spent by employees under Classifications 7, 8 and 9, in going to and from work, sleeping, eating, going to and from meals, doing work for themselves and others, shall not for any purpose be considered work time.

5. If, in any calendar week, employee shall work under other than his original Classification, his pay for that work time shall be determined, both for regular time and overtime so worked, on the above stated rate for that classification.

6. I agree to make written, signed daily reports to your home office, 415 Philtower, Tulsa, Oklahoma, on all my work time while in your *employee*.

7. It is understood that this agreement shall be effective (as to present employees executing same) as of and from July 16, 1941; that there are no oral or written understandings regarding same and it shall cancel any and all prior agreements between us (if any). You may terminate my employment at any time, either with or without cause, and either with or without notice, as you may in your uncontrollable discretion from time to time determine.

.....
Employee

Accepted on the above date:

Helmerich & Payne, Inc.

By .....
Company's Representative

Endorsed: Permission given to file out of time this 26 day of September, 1941; Royce H. Savage, Judge. Filed (9-26-41); H. P. Warfield, Clerk, U. S. District Court.

Order for Substitution of Party Plaintiff.

It The parties hereto having stipulated that L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, be sub-

stituted as party plaintiff herein in the place and stead of Thomas W. Holland, it is

Ordered that, L. Metcalfe Walling, as Administrator of the Wage and Hour Division of the United States Department of Labor, be and hereby is substituted as plaintiff herein in the place and stead of Thomas W. Holland, without prejudice to the proceedings already had in this action and that this cause may be continued and maintained by said L. Metcalfe Walling as successor in office of said Thomas W. Holland.

Dated March 25, 1942.

ROYCE H. SAVAGE, District Judge.

Endorsed: Filed Mar. 25, 1942. H. P. Warfield, Clerk, U. S. District Court. Recorded: Journal 4, Page 818.

Stipulation.

24 For the purposes of this action and for no other purposes, the plaintiff and the defendant hereby stipulate and agree as follows:

I.

The defendant is a corporation, having been organized under the laws of the State of Delaware on or about February 8, 1940, the Delaware corporation being the successor to a corporation of the same name organized and existing under the laws of the State of Oklahoma, such Oklahoma corporation having been incorporated prior to the effective date of the Fair Labor Standards Act of 1938 (October 24, 1938), and the Delaware corporation having taken over all of the assets and assumed all of the liabilities of the Oklahoma corporation without substantial change in management or personnel.

II.

Evidence of the employment and business practices of the Oklahoma corporation (including those stipulated herein) may be considered to the same force and extent, for the purposes of this action only, as if done by the Delaware corporation.

III.

The defendant is and has been since a date prior to October 24, 1938, engaged in the drilling of oil and gas wells for the purpose of producing oil and gas. Most of the wells drilled by the defendant have been drilled under contract for oil companies engaged in the production of oil and gas, but some of the wells have been drilled by the defendant on leases owned by it and for its own account. It is and has been during the same period also engaged in the production of oil and gas from leases owned and operated in whole or in part by it. In connection with both the drilling activities of the defendant and with the production activities, the defendant is and has been engaged in interrelated maintenance, repair and construction and clerical activities.

IV.

Drilling has been done by the defendant since October 24, 1938, for The Texas Company, Gulf Oil Corporation, Carter Oil Company, Stanolind Oil and Gas Company, and many other companies. During the same period of time oil has been sold by the defendant to Magnolia, Sinclair, Mid-Continent, Stanolind and many other companies.

Substantially all of the oil and gas produced, both from wells drilled by the defendant under contract with other oil companies and from wells drilled by the defendant on its own account, and oil produced from leases owned and operated by the defendant has been, and is being produced for subsequent shipment in interstate commerce either in its crude form, or as refined products, such oil moving from the state in which it may have been produced into other states.

V.

Since October 24, 1938, the defendant has carried on operations both in the drilling of oil wells and in the production of oil and gas from producing wells in various states, such activities having taken place in the states of Oklahoma, Texas, New Mexico, Illinois and elsewhere. In the furtherance of such activities, the defendant has employed an average of approximately 400 employees, of whom approximately 305 were engaged in the drilling of wells either under contract or on the defendant's own ac-

count, or were engaged in occupations and processes essential to the drilling operations; of whom approximately 70 were engaged as pumpers, etc., in the operation of oil producing leases owned and operated in whole or in part by the defendant or in processes and occupations necessary thereto and of whom approximately 25 were employed as clerical employees whose duties consisted of the performance of clerical duties in connection with both the drilling activities and the producing activities.

VI.

26 Between October 24, 1938 and October 16, 1939, the defendant employed its drilling employees under an employment contract, the terms of such contract being evidenced by an endorsement placed upon pay checks to be delivered to such employees and reading as follows:

"By endorsement of this check employee acknowledges that from 11-1-38, he is employed by Helmerich & Payne, Inc., on the following wage scale:

The base or regular rate per hour shall be paid for the first 4 hours in each 8 hour tour, and hours (in each said 8 hour tour) in excess of the four shall be paid for at 1½ times base or regular rate. Base rate shall never apply to more than 44 hours in any calendar week.

Base or regular rates are as follows:

Rotary Drillers	$1.10
Rotary Helpers	.70
Roustabouts	.48
Water Pumpers	.45
Watchmen	.28

If your particular work does not come under the above classifications, consult your foreman for your rate."

VII.

During such period, the defendant drilled an oil well known as Well No. 3, Stanecipher lease in Marion County, Illinois, under contract with the Texas Company. The employees of the defendant employed in drilling such well were as follows: (The occupations at which each of the following employees were employed are set out opposite their names together with the rates paid such employees

prior to the effective date of the Fair Labor Standards Act of 1938):

C. L. McKee	Driller	$11.00
T. B. Whitman	Helper	7.00
J. H. Langley	Helper	7.00
W. D. Howard	Helper	7.00
J. M. Faust	Watchman	4.50
R. B. Powell	Driller	11.00
A. J. Roberts	Helper	7.00
W. E. Robertson	Helper	7.00
C. E. Houghton	Helper	7.00
J. D. Nelson	Helper	7.00
Everett O'Day	Helper	7.00
Charlie Staley	Helper	11.00
J. J. Hardin	Helper	7.00
H. M. Buettemeyer	Helper	7.00
G. M. Whitson	Helper	7.00
W. C. Newsom	Helper	7.00
R. F. McCann	Helper	7.00
Ben Dryer	Helper	7.00
Charley Austin	Watchman	4.50

VIII:

27 Attached hereto, made a part hereof, and marked "Exhibit A" are full, true and correct copies of all payroll records, maintained by the defendant, showing the time worked and the wages paid the above named employees in connection with the drilling of said well. Wherever the payroll records of the defendant fail, insofar as drilling employees are concerned, to show the actual hours worked but only show days worked, the "day" will be deemed to mean a "tour of duty" consisting of 8 hours work. The hours worked, wages paid, the contract of employment, etc., as set out above and as set out in Exhibit A for the named employees, are typical of all other drilling employees of the defendant during the period specified above.

The oil produced from the above described well following its completion as a producing well was sold, shipped, transported and delivered in interstate commerce by the owner and operator of said well.

IX.

Between October 16, 1939 and October 1, 1940, the defendant employed its drilling employees under a contract of employment, such contract being evidenced by an endorsement placed upon the pay checks delivered to such employees and reading as follows:

28 "By endorsement of this check employee acknowledges that from 10-16-39, he is employed by Helmerich & Payne, Inc., on the following wage scale:

"The base or regular rate per hour shall be paid for the first 4 hours in each 8 hour tour, and hours (in each said 8 hour tour) in excess of the four shall be paid for at 1½ times base or regular rate. Base rate shall never apply to more than 42 hours in any calendar week.

Base or regular rates are as follows:

Rotary Drillers	$1.10
Rotary Helpers	.70
Roustabouts	.48
Water Pumpers	.45
Watchmen	.30

If your particular work does not come under the above classifications, consult your foreman for your rate."

X.

During the period mentioned in paragraph IX, the defendant drilled an oil well known as Well No. 3, Darvell lease in Graham County, Texas, under contract with the Continental Oil Company. The employees of the defendant employed in drilling such well were as follows: (the occupations at which each of the following employees were employed are set out opposite their names)

M. F. Self	Driller	A. E. Barnes	Helper
Earl L. Clift	Helper	J. F. Owens	Driller
G. A. Alberty	Helper	C. C. Woodall	Helper
Pad Singley	Helper	A. A. Gardner	Helper
R. H. Thompson	Helper	J. W. Cowart	Helper
L. C. Cornett	Driller	James Frost	Helper
Warren Roe	Helper	R. H. Thompson	Watchman
H. W. Lauder	Helper	James Frost	Watchman
L. H. Schiller	Helper		

XI.

29 Attached hereto and marked "Exhibit B" are full true and correct copies of all payroll records maintained by the defendant, showing the time worked and the wages paid the employees named in paragraph X above in connection with the drilling of said well. Wherever the payroll records of the defendant fail, insofar as drilling employees are concerned, to show the actual hours worked but only show days worked, the "day" will be deemed to mean a "tour of duty" consisting of 8 hours worked. The hours worked, wages paid, the contract of employment, etc., as set out above and as set out in Exhibit B for the named employees, is typical of all other drilling employees of the defendant during the period specified above.

The oil produced from the above described well following its completion as a producing well was sold, shipped, transported and delivered in interstate commerce by the owner and operator of said well.

XII.

Between October 1, 1940 and July 16, 1941, the defendant herein employed its drilling employees under a written contract of employment. A copy of such contract is attached hereto and marked "Exhibit C" and made a part hereof.

XIII.

During such period, the defendant drilled an oil well, known as Well No. B-1, School Land lease, Pottawatomie County, Oklahoma, under contract with the Morgan and Flynn Company. The employees employed in drilling such well were as follows: (the occupations at which each of the following employees were employed being set out opposite the name of each employee)

C. E. McKee	Driller	W. B. Bechtel	Helper
W. D. Howard	Helper	W. H. Whalen	Helper
W. E. Robertson	Helper	J. C. Best	Helper
Frank Smith	Helper	Rolland Everett	Watchman
L. M. Wall	Driller	James H. Langley	Helper
D. T. Meador	Helper	C. C. McPherson	Driller
J. F. Davis	Helper	B. L. Kelly	Helper
Frank Hyde	Mechanic	Murry Stine	Helper
G. A. Gresham	Driller	Frank Hyde	Mechanic
Jake Simmonds	Helper	Henry Hawkins	Driller

XIV.

30 Attached hereto, made a part hereof, and marked "Exhibit D" are full, true and correct copies of all payroll records maintained by the defendant, showing the hours worked and wages paid the employees named in paragraph XIII above in connection with the drilling of said well. The hours worked, wages paid, the contract of employment, etc., as set out above, or set out in Exhibits C and D, attached hereto, are typical to all other drilling employees of the defendant during the period specified.

The oil produced from the well described in paragraph XIII above, following its completion as a producing well, was sold, shipped, transported and delivered in interstate commerce by the owner and operator of said well.

XV.

From and after July 16, 1941, and during the pendency of this action, all drilling employees of the defendant were employed under a written contract of employment, a copy of which is attached hereto, marked "Exhibit E" and made a part hereof.

Subsequent to July 16, 1941, the defendant drilled for itself a well known as No. C-7, School Land lease, Pottawatomie County, Oklahoma. The employees employed
31 in drilling such well were as follows (the occupations at which each of such employees were employed is set out opposite the names of such employees):

Jack Wilson	Driller	Frank Hyde	Mechanic
H. E. Silas	Helper	H. C. Rich	Driller
Gerkin Gaber	Helper	A. F. Griffin	Helper
Earl Coleman	Helper	M. L. Tucker	Helper
L. H. Baker	Driller	Egra Gibson	Helper
C. L. McKee	Driller	Otto Nugent	Water pumper
W. D. Howard	Helper	Jack Wilson	Helper
Frank Smith	Helper		

XVI.

Attached hereto, marked "Exhibit F" and made a part hereof, are full, true and correct copies of all payroll records, showing the hours worked and wages paid for each of the said employees in connection with the drilling

of the well described in paragraph XV hereof. The hours worked, wages paid, the contract of employment, etc., as set out above, and set out in Exhibits E and F attached hereto, are typical of those conditions of employment as they apply to all other drilling employees of the defendant during the period specified.

The oil produced from the above described well following its completion as a producing well, was sold, shipped, transported and delivered in interstate commerce by the owner and operator of said well.

XVII.

Between October 24, 1938, and Sept. 1, 1940, the defendant employed production employees (pumpers and switchers on producing leases) in connection with producing leases owned and operated in whole or in part by the defendant under an oral contract of employment providing for a regular monthly salary to be paid such production employees irrespective of the actual number of hours worked by them during the weeks of their employment and irrespective of the number of hours reported to the defendant by them as having been worked. During said period, the defendant owned and operated a producing lease known as the Russell lease in McPherson County, Kansas, said lease being operated by a pumper residing on said lease at all times during said period. Said pumper was paid the sum of $130.00 per month for his employment on said lease, said sum being paid to him each month irrespective of the actual number of hours worked by him and irrespective of the number of hours of work reported by him to the defendant. The name of the pumper residing on said lease and operating the same for and on behalf of the defendant herein is Homer J. Farrar. Attached hereto, made a part hereof and marked "Exhibit G" is a full, true and correct copy of typical payroll records maintained by the defendant for said employee during the said period. The method of payment of this employee, Homer J. Farrar, and the payroll records maintained by the defendant as set out in "Exhibit G" in connection with his employment are typical of all pumpers or other production employees employed by the defendant during said period as to all leases owned and operated in whole or in part by the defendant though there is a variation among the production

employees employed by the defendant as to the hours worked and wages paid such employees, such variation being occasioned by the differences in the leases, seniority of service, and other causes, however many of such production employees frequently worked hours in excess of the maximum specified in Section 7 of the Act.

The oil produced from the above described lease was sold to Shell Oil Company at the lease where said oil was produced. Said oil was thereafter intermingled with oil produced from other leases owned by persons or corporations other than this defendant and substantial portions of such intermingled oil was subsequently shipped outside the State of Kansas either as crude oil or as refined products thereof. Oil produced from other leases elsewhere owned by the defendant was similarly sold and intermingled with oil produced by others and shipped in interstate commerce either as crude oil or refined products thereof.

XVIII.

Between Sept. 4, 1940 and July 15, 1941, production employees were employed by the defendant herein under a written contract of employment, a copy of which is hereto attached, marked "Exhibit C" and made a part hereof. During such period the defendant owned and operated the lease in McPherson County, Kansas, described in paragraph XVII hereof. The said lease was operated by the same resident pumper named in paragraph XVII hereof. A full, true and correct copy of typical payroll records maintained by the defendant for said employee are attached hereto, made a part hereof, and marked "Exhibit H".

The method of payment of this employee, Homer J. Farrar, and the payroll records maintained by the defendant as set out in "Exhibit H" in connection with his employment are typical of all pumpers or other production employees employed by the defendant during said period as to all leases owned and operated in whole or in part by the defendant though there is a variation among the production employees employed by the defendant as to the hours worked and wages paid such employees, such variation being occasioned by the differences in the leases, seniority of services and other causes, however many of such production employees frequently worked hours in excess of

the maximum specified in Section 7 of the Act without being compensated therefor with any compensation, except as provided in said contract identified in Exhibit C.

The oil produced from the above described lease was sold to Shell Oil Company at the lease where said oil was produced. Said oil was thereafter intermingled with oil produced from other leases owned by persons or corporations other than this defendant and substantial portions of such intermingled oil was subsequently shipped outside the
34 State of Kansas either as crude oil or as refined products thereof. Oil produced from other leases owned elsewhere by the defendant was similarly sold and intermingled with oil produced by others and shipped in interstate commerce either as crude oil or refined products thereof.

XIX.

From and after the 16th day of July, 1941, and during the pendency of this action, pumpers employed by the defendant were employed under a written contract of employment, a copy of which is attached hereto, made a part hereof and marked "Exhibit I". The lease described in paragraph XVII was and is being operated by the defendant through the employee named in Paragraph XVII. A full, true and correct copy of typical payroll records maintained by the defendant for said employee during such period are attached hereto, made a part hereof, and marked "Exhibit J".

The method of payment of this employee, Homer J. Farrar, and the payroll records maintained by the defendant as set out in "Exhibit I" in connection with his employment are typical of all pumpers or other production employees employed by the defendant during said period as to all leases owned and operated in whole or in part by the defendant though there is a variation among the production employees employed by the defendant as to the hours worked and wages paid such employees, such variation being occasioned by the difference in the leases, seniority of service, and other causes, however many of such production employees frequently worked hours in excess of the maximum specified in Section 7 of the Act without being compensated therefor, except as provided under contract identified as "Exhibit I".

The oil produced from the above described lease was sold to Shell Oil Company at the lease where said oil was produced. Said oil was thereafter intermingled with oil produced from other leases owned by persons or corporations other than this defendant and substantial portions of such intermingled oil was subsequently shipped outside the State of Kansas either as crude oil or as refined products thereof.

Oil produced from other leases elsewhere owned by the defendant was similarly sold and intermingled with oil produced by others and shipped in interstate commerce either as crude oil or refined products thereof.

XX.

Between October 24, 1938 and October 1, 1940, the defendant herein employed various employees as truck drivers and swampers (truck drivers' helpers) under an oral contract of employment providing for a regular monthly salary irrespective of the hours actually worked by such employees and irrespective of the hours of work by such employees to the defendant. The work performed by such employees was in connection with and necessary to the carrying on of drilling activities and of production activities by the defendant. Such employees in performance of their duties, in connection with the carrying on of drilling activities and production activities, carried equipment such as rigs, boilers, cable drilling tools, fuel, drilling mud, water pumping equipment, rod pulling equipment, etc., to and from the places where such equipment was used in the above described drilling activities and production activities, and without the transportation of such equipment and supplies, the operation of the drilling rigs or of the producing wells would have been greatly handicapped, if not rendered impossible. In addition, transportation to employees was often furnished to and from the places where such drilling activities and production activities were carried on. Among other employees employed by the defendant in such occupations was Frank Wilson. Attached hereto, made a part hereof, and marked "Exhibit K" is a full, true and correct copy of typical payroll records maintained during said period by the defendant for said employee. The said employee is typical of employees engaged in truck driving or as swampers by the company in all of its operations and the payroll records attached are typical of the records maintained by

the defendant for all such employees, and the facts reflected in such records as to the hours worked and the wages paid Frank Wilson are typical of the hours worked and the wages paid to all of the employees employed in similar occupations by the defendant.

36 Nothing in this paragraph shall be deemed to be a waiver by the defendant of the exemption from overtime granted drivers of private carriers under Section 13(b)(1) of the Act during those workweeks in which such driver or drivers crossed state lines in pursuit of their duties.

XXI.

Between October 1, 1940, and July 15, 1941, the defendant employed employees as truck drivers and swampers under a written contract of employment. A copy of such contract is attached hereto, marked "Exhibit C" and made a part hereof. During such period, the same employee named in Paragraph XX was employed in the same occupation as specified in Paragraph XX. Attached hereto, made a part hereof, and marked "Exhibit L" are full, true and correct copies of typical payroll records maintained by the defendant for such employee during the period. The said employee is typical of employees engaged in truck driving or as swampers by the company in all of its operations and the payroll records attached are typical of the records maintained by the defendant for all such employees, and the facts reflected in such records as to the hours worked and the wages paid Frank Wilson are typical of the hours worked and the wages paid to all employees employed in similar occupations by the defendant.

Nothing in this paragraph shall be deemed to be a waiver by the defendant herein of the exemption from overtime granted drivers of private carriers under Section 13(b)(1) of the Act during those workweeks in which such driver or drivers crossed state lines in pursuit of their duties.

XXII.

From and after July 15, 1941, the defendant herein employed employees engaged as truck drivers or swampers under a written contract of employment. A copy of such contract is attached hereto, marked "Exhibit E". The em-

ployee named in paragraph XXI hereof was and is employed as such employee by the defendant in connection with the carrying on of the defendant of its drilling
37 and production activities and operations. A full, true and correct copy of typical payroll records maintained by the defendant for such employee for such period are attached hereto, marked "Exhibit M" and made a part hereof. The said employee is typical of employees engaged in truck driving or as swampers by the company in all of its operations and the payroll records attached are typical of the records maintained by the defendant for all such employees, and the facts reflected in such records as to the hours worked and the wages paid Frank Wilson are typical of the hours worked and the wages paid to all employees employed in similar occupations by the defendant.

Nothing in this paragraph shall be deemed to be a waiver by the defendant herein of the exemption from overtime granted drivers of private carriers under Section 13(b)(1) of the Act during those workweeks in which such driver or drivers crossed state lines in pursuit of their duties.

XXIII.

The defendant has, in connection with its drilling operations, as described more particularly in Paragraphs VI to XIX inclusive hereof, employed various employees as watchmen and water pumpers. Such employees so employed have been employed under the contracts set out in Paragraphs VI to XIX inclusive hereof, and have been compensated in the same manner as were the employees named in said paragraphs. The information in said paragraphs and in the exhibits attached hereto as to the wages paid and hours worked are typical of the water pumpers and watchmen although there is a variation as to the total hours worked and as to the total wages paid between various jobs due to various circumstances. The watchmen were, under ordinary circumstances, required to perform no specific duties but were merely required to watch a rig, either during a temporary shutdown or between drilling jobs. The rigs
38 watched by the watchmen were used for the purpose of drilling oil and gas wells. The water pumpers were engaged in pumping water from water wells located near drilling locations where the defendant was exploring

for oil and gas, the water so pumped being used in connection with and necessary to the drilling operations.

XXIV.

The Administrator of the Wage and Hour Division, United States Department of Labor, predecessor in office of the plaintiff herein, in accordance with and pursuant to the authority conferred on him by Section 11(c) of the Act, did on October 21, 1938, duly issue and promulgate regulations prescribing the records of persons employed, and of wages, hours and other conditions and practices of employment to be made, kept and *preserves* by every employer subject to the Act. Exhibit A attached to the complaint filed herein is a full, true and correct copy of the Regulations, known as Title 29, Chapter V, Code of Federal Regulations, Part 516, that were in effect at the time this action was brought, and Exhibit W hereto, made a part hereof is a full, true and correct copy of such regulations as presently in force.

XXV.

Nothing in this Stipulation shall in any manner be deemed to preclude either party hereto from introducing further evidence, either oral or documentary, and such further evidence may be as to matters not covered herein, or cumulative in nature.

39 Executed by the respective parties hereto by and through their attorneys, this 13 day of April, A. D. 1942.

WARNER W. GARDNER, ESQUIRE,
Solicitor of Labor;
ROY C. FRANK,
Assistant Solicitor;
LLEWELLYN B. DIEKE,
Regional Attorney;
EARL STREET,
Associate Attorney,
Attorneys for Plaintiff.

EUGENE O. MONNET,

.....

Attorneys for Defendant.

Endorsed: Filed in open court May 13, 1942. H. P. Warfield, Clerk, U. S. District Court.

SEMI-MONTHLY TIME SHEET

Hefner Creek & Pipeline (Company)

Texas Co (Company Owning Lease) Stonecipher (Name of Lease) Well No. 3 String No. 17

First Half Month of Nov 1934 Foreman

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total No. Days	RATE	AMOUNT
G. F. McKee	Driller	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	11 00	132 00
J. B. Whitson	Helper	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
J. H. Langley	"	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
W. D. Howard	"	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
A. M. Jarrett	Watchman									✓	✓	✓					4	4.50	18 00
W. B. Powell	Driller	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	15	12 00	180 00
A. J. Roberts	Helper	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	15	7 00	105 00
W. E. Robertson	"	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
C. E. Houghton	"	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
J. D. Nelson	"	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	12	7 00	84 00
Everett O. Day	"						✓										1	7 00	7 00
Charlie Staley	Driller	✓	✓	✓	✓	✓	✓						✓	✓	✓	✓	13	11 00	143 00
J. J. Hardin	Helper	✓	✓	✓	✓	✓	✓						✓	✓	✓	✓	13	7 00	91 00
H. M. Buettemeyer	"	✓	✓	✓	✓	✓	✓						✓	✓	✓	✓	13	7 00	91 00
T. M. Whitson	"	✓	✓	✓	✓	✓	✓						✓	✓	✓	✓	13	7 00	91 00
W. C. Rawson	"						✓										1	7 00	7 00
E. F. McCann	"						✓										1	7 00	7 00
Dave Dryer	"						✓										1	7 00	7 00
Shirley Austin	Watchman	✓															1	4.50	4.50

DEDUCTIONS

NAME	Draft No.	Amount
Dave Dryer	2023	6 93
Claude McKeever		2 00

#1 O. Johnson $104.00 — TOTAL PAY ROLL $1387.50

J. Stonecipher 760.50 — TOTAL DEDUCTIONS 9 81

City of Eastland 523.00 — BALANCE DUE $1364.69

$1387.50

C H B 13.88

2-B

Ex "A"

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

A B Powell
Supt. or Foreman

SEMI-MONTHLY TIME SHEET

Helmerich & Payne (31)
Company

Continental — Company Owning Lease
Dowell — Name of Lease
3 — Well No
21 — String No
First — Half Month of May 1939
Foreman L C Cornett

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	Total No Days	RATE	AMOUNT
E. Self	Driller	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	11 00	143 00
L. Clift	Helper	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	7 00	91 00
Alberty	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	7 00	91 00
Singley	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	7 00	91 00
Thompson	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	7 00	91 00
Cornett	Driller	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	15	12 50	187 50
Roe	Helper	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17	7 00	119 00
Lauder	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17	7 00	119 00
Schiller	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17	7 00	119 00
Barnes	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17	7 00	119 00
Owens	Driller	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13	11 00	143 00
Woodall	Helper	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	14	7 00	98 00
Gardner	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	14	7 00	98 00
Cowart	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	14	7 00	98 00
James Frost	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	15	7 00	105 00
P.H Thompson	Watchman										✓	✓						2	4 50	9 00
James Frost	"																	1	4 50	4 50

DEDUCTIONS

NAME	Draft No.	Amount
B		1539

TOTAL PAY ROLL	1726 00
TOTAL DEDUCTIONS	1539
BALANCE DUE	1,71061

(2-B)

Ex B

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

A. R. Calman
Supt. or Foreman

[Exhibit C.]

HB Employment Contract No. 529

Place Salem Ill Date Sept 4-1940

Helmerich & Payne, Inc., 415 Philtower, Tulsa, Oklahoma.

Gentlemen: I hereby accept employment with you as a Rotary Helper upon the following wage scale and conditions, to-wit:

The base or regular rate per hour for employees coming under classifications 1, 2, 3, 4, 5, 6, 7 and 10 below shall be paid for the first 4 hours in each 8 hour tour and hours (in each said 8 hour tour) in excess of the 4 shall be paid for at 1½ times said base or regular rate.

The base or regular rate per hour for employees under classifications 9, 11 and 12 below shall be paid for the first 5 hours in each 12 hour tour and hours (in each said 12 hour tour) in excess of the 5 shall be paid at 1½ times base or regular rate.

The base or regular rate per hour for employees under classification 8 noted below shall be paid for the first 5 hours in each 10 hour tour and hours (in each said 10 hour tour) in excess of the 5 shall be paid for at 1½ times base or regular rate.

In event each monthly compensation of any employee of the following classifications:

Lease Pumpers	(classification No. 8)	$130.00
Truck Drivers	(classification No. 11)	165.00
Swampers	(classification No. 12)	150.00

does not equal the sum hereinabove set opposite the same, the Company will advance said employee the difference which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases.

Base or regular hourly rates are as follows:

Classification	1 Rotary Driller	$1.10
"	2 Rotary Helpers	.70
"	3 Cable Driller	1.00
"	4 Tool Dresser	.80
"	5 Mechanics	.70
"	6 Roustabouts (in Kansas & Texas)	.48
"	7 Water Pumpers	.45
"	8 Lease Pumpers	.34
"	9 Watchmen	.30
"	10 Roustabouts (In Okla. & Illinois)	.50
"	11 Truck Drivers	.35
"	12 Swampers	.32

Base rate shall never apply to more than 40 hours in any work week.

I agree to make daily reports to your home office at 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

It is understood that you may terminate my employment at any time either with or without cause and either with or without notice as you may in your uncontrollable discretion from time to time determine.

W. E. BECHTEL, Employee.

Witnesseth:
CHAS STALEY,
Company's Representative. (2-E)

90

SEMI-MONTHLY TIME SHEET — **HELMERICH & PAYNE, INC.**

Morgan & Flynn — Name of Lessee: School Land — Well No.: B-1 — Rig No.: 8 — Casing No.:

Last Half-Month of April 194 1 — Foreman: F M Hall

NAME	OCCUPATION	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Hrs.	R.T O.T	RATE R.T	RATE O.T	AMOUNT
F Mc Kee	Driller	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓							80	40	1.10	1.65	110.00
D Howard	Helper	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓							80	40	.90	1.05	70.00
B Robertson	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓							80	40	.70	1.05	70.00
and Smith	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓							80	40	.70	1.05	70.00
m Hall	Driller	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	120	60	.75	1.13	189.50
J Meador	Helper	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	½	½					82	41	.90	1.05	86.30
J Davis	"	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓							80	40	.70	1.05	70.00
and Hyde	Mech.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	140	60	.70	1.05	105.00
G Gresham	Driller	✓	✓	✓	✓	✓	✓	✓	✓			✓								72	36	1.10	1.65	99.00
de Simmonds	Helper	✓	✓	✓	✓	✓		✓	✓	✓										72	36	.70	1.05	63.00
B Buffel	"	✓	✓	✓	✓	✓	✓	✓	✓	✓							½	½		82	41	.90	1.05	79.00
H Whalen	"	✓	✓	✓	✓	✓	✓	✓	✓	✓										80	40	.70	1.05	70.00
C Beat	"	—								✓										5	4	.70	1.05	7.00
land Everett	Watchman											½	½							14	10	.90	.45	9.30

DEDUCTIONS NAME	Draft No.	Amount
C Beat	3683	6 93
Gresham	3684	98 01
Buffel	3685	78 21
Whalen	3686	69 30
Hall	Gen	6 38
Mc Kee	✓	7 00
Robertson	✓	7 73
Meador	✓	7 67
Hyde	✓	3 73
O A B		1095
		390 91

OFFICE DISTRIBUTION: School Land B-1 — AMOUNT: 1096 10

TOTAL PAY ROLL	1096 10
TOTAL DEDUCTIONS	390 91
BALANCE DUE	705 19

2-G

Ex "D"

I hereby certify that the men above named have been employed in the service of this Company and that the time and rates shown above are correct.

F M Hall
Supt. or Foreman

35

35

SEMI-MONTHLY TIME SHEET — **HELMERICH & PAYNE, INC.**

The Texas Co — Name of Lease: N. Butcher — Well No. 1 — Survey No. 8

Helmerich & Payne — Name of Lease: School land — Well No. B-1 — Survey No. 8

First Half Month of April 194 1 — Foreman L. M. Hall

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total Hrs.	R.T.	O.T.	RATE R.T.	RATE O.T.	AMOUNT
C L McKee	Driller	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	170	60	110		1.65	165.00
W B Howard	Helper	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	170	60	70		1.05	105.00
James N Langley	"	✓	✓	✓	✓												40	20	20		1.05	35.00
Frank Boyle	"	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	170	60	70		1.05	105.00
N B Robytton	"						✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	80	40	40		1.05	70.00
C C McPherson	Driller	✓	✓	✓																		
B J Kelly	Helper	✓	✓	✓													37	16	20		1.05	37.80
Murry Stine	"	✓															8	4	4		1.05	7.00
Fraud Hyde	Mech	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	170	60	70		1.05	105.00
Henry Harkins	Helper	✓	✓	✓													37	16	20		1.05	37.80
L G Graham	Driller	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	117	56	61		1.65	154.00
Jake Simmonds	Helper	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	117	56	61		1.05	98.00
W E Bechtel	"	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	117	56	61		1.05	98.00
W N Nealon	"	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	117	56	61		1.05	98.00
L M Hall	Driller				✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	90	42	48	1.75	1.875	150.00
D J Meador	Helper						✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	80	40	40		1.05	70.00
J J Davis	"						✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	80	40	40		1.05	70.00
Rolland Emmett	Watchman					✓	✓										24	16	8		.45	9.30

Butcher #1 — School land B-1

DEDUCTIONS

NAME	Ded. No.	Amount
W B Howard	3680	34.68
Frank Boyle	3681	34.65
James N Langley	3682	34.65
L M Wall	Loan	6.40
C L McKee	✓	7.00
W E Robertson	✓	7.73
Frank Boyle	✓	3.73
D J McAdoo	✓	7.68
W E Bechtel	✓	7.81
O A B		13.95
		131.32

OFFICE DISTRIBUTION

	AMOUNT
N Butcher #1	391.50
School land B-1	1,003.80

TOTAL PAY ROLL	1395.30
TOTAL DEDUCTIONS	131.32
BALANCE DUE	1264.98

OAB

2-H

Ex "D"

I hereby certify that the men above named have been employed in the service of this Company and that the time and rates above shown are correct.

L. M. Hall
Supt. or Foreman

[Exhibit E.]

Helmerich & Payne, Inc.

General Employment Contract.

Place South Maud Date 9/28/41

Helmerich & Payne, Inc., 415 Philtower, Tulsa, Oklahoma.

No. G 726

Gentlemen: I hereby accept employment with you as a Rotary Driller upon the following wage scale and conditions, to-wit:

1. The Base or Regular rate per hour for all classes of employees covered by this contract shall be paid for the first 40 hours worked in each calendar week and all hours in said week in excess of said 40 shall be paid for at one and one-half times said Base or Regular rate. Wages shall be paid bi-weekly (every 2 calendar weeks).

2. In the event any said bi-weekly compensation of any employee of the following classifications:

Truck Drivers	Classification 7	$80.80
Swampers	Classification 8	$74.00
Tandem Truck Drivers	Classification 9	$92.30

does not equal the sum hereinbefore set opposite the same, the company may advance and loan said employee the difference, which shall apply on future overtime payments; adjustments and accounting to be made on the first day of each year (or sooner if the company desires) and/or when said employment ceases.

3. Base or Regular hourly rates are as follows:

Classification 1 Rotary Driller	$1.33 1/3
Classification 2 Rotary Helper, except in Ill.	.82
Classification 3 Cable Driller	1.25
Classification 4 Tool Dresser	1.00
Classification 5 Rotary Helper in Illinois	.85
Classification 6 Roustabouts	.58
Classification 7 Truck Drivers	.40
Classification 8 Swampers	.42
Classification 9 Tandem Truck Drivers	.52

"Rotary Helper", under Classifications 2 and 5, shall mean and include Derrick Men, Floor Men, Motor Men and Mechanics.

4. Time spent by employees under Classifications 7, 8 and 9, in going to and from work, sleeping, eating, going to and from meals, doing work for themselves and others, shall not for any purpose be considered work time.

5. If, in any calendar week, employee shall work under other than his original classification, his pay for that work time shall be determined, both for regular time and overtime so worked, on the above stated rate for that classification.

6. I agree to make written, signed daily reports to your home office, 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

7. It is understood that this agreement shall be effective (as to present employees executing same) as of and from July 16, 1941; that there are no oral or written understandings regarding same and it shall cancel any and all prior agreements between us (if any). You may terminate my employment at any time, either with or without cause, and either with or without notice, as you may in your uncontrollable discretion from time to time determine.

H. H. Rich, Employee.

Accepted on above date:
Helmerich & Payne, Inc.,
By C. L. McKee,
Company's Representative.

(2-1)

19

SEMI-MONTHLY TIME SHEET — HELMERICH & PAYNE, INC.

Helmerich & Payne — Company Doing Logging | School Land — Name of Lease | Well No. C-7 | Lease No. 8

3/16 Half Month of March 31 1942 | Foreman C. L. McKee

NAME	OCCUPATION	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Hrs.	RATE S.T.	RATE O.T.	AMOUNT
Jack Wilson	driller	8	8															16	.33	.33	71 33
H. C. Silas	helper	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	104	.30	.37	95 17
Martin Huber	helper	8	8	8	8	8	8	8	8	8								72	.30	.37	65 60
Earl Coleman	helper	8	8	8	8	8	8	8	8	8	8	8						104	.30	.37	95 17
L. H. Baker	driller			8	8	8	8	8	8	8								72	.33	.49	96 00
C. L. McKee	driller	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	176	.30	—	175 00
W. D. Hayward	helper	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	112	.30	.37	101 96
Frank Smith	helper	8	8															16	.30	.37	3 80
Frank Hyde	helper	8	8	16	8	8	8	8	8	8	8	8	8	8	8	8	8	176	.30	.37	177 18
H. H. Rich	driller	8	8	8	8	8	8	8	8	8	8	8						96	.30	.33	138 66
A. J. Griffin	helper	8	8	8	8	8	8	8	8	8	8	8						96	.30	.37	85 28
N. L. Taylor	helper	8	8	8	8	8	8	8	8	8	8	8						96	.30	.37	85 28
Ezra Gibson	helper	8	8	8	8	8	8	8	8	8	8	8						96	.30	.37	85 28
Otto Nugent	watch pumper	12	12	12	12	12	12	12	12	12	12	12	12					144	.30	.37	54 60
Jack Wilson	helper			8	8	8	8	8	8	8	8	8	8					88	.30	.37	8 00

DEDUCTIONS

NAME	Check No.	Amount
C. L. McKee	Draw	100
Frank Hyde	/	373
H. H. Rich	/	100

OAB

1339 21 17

E-11-E-111 OFFICE DISTRIBUTION: School Land C-7 Alla

AMOUNT	
1339 21	TOTAL PAY ROLL
21 17	TOTAL DEDUCTIONS
1318 09	BALANCE DUE

Alla

EV F

RB

(2-L)

I hereby certify that the men above named have been employed in the service of this Company and that the time and rates shown above are correct.

C. L. McKee

Supt. or Foreman

56

SEMI-MONTHLY TIME SHEET — HELMERICH & PAYNE, INC.

Helmerich and Payne — School Land — Well No. C-7 — Survey No. 8

Contract Drilling Name — Name of Lease — Well No. — Survey No.

2-2 ending 5-15-41 — Foreman L. L. McKee

Height of ... 194

NAME	OCCUPATION	7 8 9 10 11 12 13 14 15 16 17	Total Hrs	RATE S.T.	RATE O.T.	AMOUNT
Jack Nelson	Driller		170			170.66
W. C. Silas	Helper		97½			104.96
Gordon Ryder	"		97½			104.96
Carl Robinson	"		97½			104.96
L. L. McKee	Driller		175			175.00
R. D. Howard	Helper		97½			104.96
Leroy Smith	"		97½			104.96
Frank Hyde	Mechanic		54			58.04
E. F. Webb	Driller		170			182.66
A. T. Griffin	Helper		170			114.80
R. L. Parker	"		170			114.80
Ezra Gibson	"		170			114.80
Tom Ewing	"		93			39.36
Otto Knight	Tool Pusher		168			63.70

DEDUCTIONS

NAME	Ded. No.	Amount
L. L. McKee	2	7.00
Frank Hyde	1	3.73
E. F. Webb	1	7.00
OAB		15.00
		3.73

4-11-X-41 OFFICE DISTRIBUTION: School Land C-7 Okla

	AMOUNT
TOTAL PAY ROLL	1553.28
TOTAL DEDUCTIONS	25.28
BALANCE DUE	1528.00

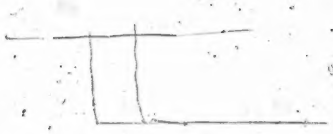
Okla.

Ex F

2-M

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

L. L. McKee
Name of Foreman



STANDARD FORM [182A] PER SALE BY MID-WEST PTG. CO TULSA, OKLAHOMA

(1)

REGISTRATION NO. 437-10-9728 **LABOR TIME SHEET** Dec 1-15 1935

NAME Homer A. Farrar AT Galva Kans.

DAY	HRS	RATE	AMOUNT	WORK DONE	CHARGE
1	6		$6250	Pumper 4 Wells - Russell B	Russell B-59
2	6		"	1 Well - Russell 5A	"
3	6		"	"	"
4	6		"	"	"
5	6		"	"	"
6	6		"	"	"
7	6		"	"	"
8	6		"	"	"
9	6		"	"	"
10	6		"	"	"
11	6		"	"	"
12	6		"	"	"
13	6		"	"	"
14	6		"	"	"
15	6		"	"	"
16					
17					
18					
19				Russell 5A 1 x 60 =	
20				" B 50.00 =	
21					
22					
23					
24					
25					
26					
27					
28					
29					
30					
31					
TOTAL 5			$6250		

(1-A)

DEDUCTIONS 1 x 60

O A B 63

AMOUNT DUE 6187

CERTIFICATE

THE TIME AND RATE AS SHOWN ON THIS SHEET IS CORRECT AND REPRESENTS ALL TIME PUT IN BY ME IN THE SERVICE OF THIS COMPANY FOR THE MONTH OF

Dec 15 1935

SIGNED Ex G

APPROVED John McMasters APPROVED

STANDARD FORM [182A] FOR SALE BY MID-WEST PTG. CO. TULSA, OKLAHOMA

REGISTRATION No 437-10-9776 **LABOR TIME SHEET** March 1-15 (10) 39

NAME Homer J. Farrar AT Galva, Kans.

DAY	HRS	RATE	AMOUNT	WORK DONE	CHARGE
1	6			Pumper 4 Wells - Russell B	Russell B - 5A
2	6			1 Well - Russell 3A	
3	6				
4	6				
5	6				
6	6				
7	6				
8	6				
9	6				
10	6				
11	6				
12	6				
13	6				
14	6				
15	6				
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					
26					
27					
28					
29					
30					
31					
TOTAL	85		$65.00		

(1-B)

DEDUCTIONS 6.50

O.A.B. .65

AMOUNT DUE 64.35

CERTIFICATE

THE TIME AND RATE AS SHOWN ON THI[S] CORRECT AND REPRESENTS ALL TIME PUT IN BY ME IN THE SERVI[CE] COMPANY FOR THE MONTH OF

March 15 39

SIGNED Eq G

APPROVED John McMasters APPROVED

STANDARD FORM [182A] FOR SALE BY MID-WEST PTG. CO. TULSA, OKLAHOMA

REGISTRATION NO 437-10-3796 **LABOR TIME SHEET** June 1 - 15 (5) 1939

NAME Homer J. Farrar AT Galva, Kans.

DAY	HRS	RATE	AMOUNT	WORK DONE	CHARGE
1	6			Pumper 4 Wells - Russell B	Russell B - 50 # 13 ⁰⁰
2	6			" 1 Well - Russell SB	
3	6			"	
4	6			"	
5	6			"	
6	6			"	
7	6			"	
8	6			"	
9	6			"	
10	6			"	
11	6			"	
12	6			"	
13	6			"	
14	6			"	
15	6			"	
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					
26					
27					
28					
29					
30					
31					
TO 15			$65 00		(1-B)

DEDUCTIONS		
	65	00
OAB		65
AMOUNT DUE	64	35

CERTIFICATE

THE TIME AND RATE AS SHOWN ON THIS SHEET IS CORRECT AND REPRESENTS ALL TIME PUT IN BY ME IN THE SERVICE OF THIS COMPANY FOR THE MONTH OF June 15 1939

Ex G

APPROVED J. L. Martin APPROVED

HELMERICH & PAYNE, INC.

LABOR TIME SHEET

Exh (11)

NAME Homer J. Farrar

ADDRESS Galva, Kansas

FOR First HALF OF December 1940 REGISTRATION NO 437-10-9796

DATE	KIND OF WORK DONE		CHARGE	HOURS	RATE	AMOUNT
1 16	Pumping Wells	4 Wells -- Russell B.	Russell B-5A	10		
2 17	Pumping Wells	1 Well -- Russell 5A	Russell B-5A	10		
3 18	Pumping Wells		Russell B-5A	10		
4 19	Pumping Wells		Russell B-5A	10		
5 20	Pumping Wells		Russell B-5A	10		
6 21	Pumping Wells		Russell B-5A	10		
7 23	Pumping Wells		Russell B-5A	10		
8 23	Pumping Wells		Russell B-5A	10		
9 24	Pumping Wells		Russell B-5A	10		
10 25	Pumping Wells		Russell B-5A	10		
11 26	Pumping Wells		Russell B-5A	10		
12 27	Pumping Wells		Russell B-5A	10		
13 28	Pumping Wells		Russell B-5A	10		
14 29	Pumping Wells		Russell B-5A	10		
15 30	Pumping Wells		Russell B-5A	10		
31						

DEDUCTIONS NAME	SHIFT NO.	AMOUNT
Home Rent		5 00
Drug		2 58
O.A.B.		65
TOTAL		8 23

Russell B 5x.00/ -5A. 15.00/

TOTAL PAYROLL 65 00

OFFICE USE ONLY

TOTAL DEDUCTIONS 8 23

BALANCE DUE 56 77

CERTIFICATE

THE TIME AND RATE AS SHOWN ON THIS SHEET IS CORRECT AND REPRESENTS ALL TIME PUT IN BY ME IN THE SERVICE OF THIS COMPANY FOR THE MONTH OF Dec. 15 1940

SIGNED

APPROVED John McMasters OFFICE APPROVED 1-E SUPT

49

HELMERICH & PAYNE, I. ..

LABOR TIME SHEET

Eq H (11)

NAME Homer d. Farrar

ADDRESS Galva, Kans.

FOR First HALF OF April 1941 REGISTRATION NO 437-10-9796

DATE	KIND OF WORK DONE		CHARGE	HOURS	RATE	AMOUNT
1 10	Pumping Wells	4 Wells --- Russell B	Russell B-C-5A	14		
8 17	Pumping Wells	5 Wells --- Russell C	Russell B-C-5A	10		
8 18	Pumping Wells	1 Well --- Russell 5A	Russell B-C-5A	10		
8 19	Pumping Wells		Russell B-C-5A	10		
8 20	Pumping Wells		Russell B-C-5A	10		
8 21	Pumping Wells		Russell B-C-5A	10		
7 22	Pumping Wells		Russell B-C-5A	10		
8 23	Pumping Wells		Russell B-C-5A	10		
8 24	Pumping Wells		Russell B-C-5A	10		
10 25	Pumping Wells		Russell B-C-5A	10		
11 26	Pumping Wells		Russell B-C-5A	10		
12 27	Pumping Wells		Russell B-C-5A	10		
13 28	Pumping Wells		Russell B-C-5A	10		
14 29	Pumping Wells		Russell B-C-5A	10		
15 30	Pumping Wells		Russell B-C-5A	10		
31						

DEDUCTIONS NAME	SHIFTS	AMOUNT
Social		258
OAB		78
TOTAL		336

14 Russell B 31.98 ✓
" C 38.75 ✓
5-A 7.75 ✓

TOTAL PAYROLL 77.50

OFFICE USE ONLY

TOTAL DEDUCTIONS 336

BALANCE DUE 7414

CERTIFICATE

THE TIME AND RATE AS SHOWN ON THIS SHEET IS CORRECT AND REPRESENTS ALL TIME PUT IN BY ME IN THE SERVICE OF THIS COMPANY FOR THE MONTH OF April 15 1941

SIGNED

APPROVED J. Timmerman

OFFICE APPROVED

SUPT

[Exhibit 1.]

#17

Helmerich & Payne, Inc.

Full Time Lease Pumper's Contract.

Place Galva Kns Date 10-6-41

Helmerick & Payne, Inc., 415 Philtower, Tulsa, Oklahoma,

Attention: Production Superintendent No. P 33

Gentlemen: I hereby accept employment with you as a full time lease pumper to pump and look after your Russell-B-C-5A Lease in McPherson, Kns County, McPherson, on the following wage scale and conditions, to-wit:

1. You will pay me $38.93 per week, payable bi-weekly (every two weeks).

(A) You will permit me to use, as long as I am in your employ on said lease, the lease house (as is) on said lease, if same is available, and also permit me, at my own risk, cost and expense, to use for my domestic purposes only, such gas as is in your sole discretion available from such lease; and also furnish lights for said house if same are (in your discretion) available at reasonable domestic rates and without cost to you of extending lines; for which I agree to pay you the sum of $2.00 per week, which you may deduct from my pay check.

2. I agree to promptly make written, signed daily reports to your home office, 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ, and it is understood that you may terminate my employment at any time, either with or without cause, and either with or without notice, as you may in your uncontrollable discretion from time to time determine, in which event I agree to promptly and immediately vacate the premises in its original condition, ordinary wear and tear excepted.

3. The number of hours which I work on this lease will, no doubt, vary to some little extent from week to week. Under the Federal Fair Labor Standards Act my pay may not be less than thirty (30) cents per hour for the first 40 hours in each said work week, and forty-five (45) cents per hour thereafter in said work week. Except as otherwise

hereinafter provided I am not being employed on a specific rate per hour, but I am being employed with the understanding that the above indicated pay shall completely cover and include (subject to Paragraph 4) my regular time and overtime in each work week, and that my regular hourly rate per each work week shall be determined each said work week by the following formula:

Let X equal my regular or base hourly wage for each work week. X shall then be determined by multiplying X by the number of hours in each week which I work up to the first 40 and adding to it the number of hours worked in said work week in excess of said 40 hours times 3X 2, which shall equal the compensation I receive for that week.

In other words, if, for the first week I work, I receive the sum of $30.00, and I worked 50 hours in that week, my regular hourly rate scale for that week would be determined as follows:

40X plus 15X equal $30.00, or 55X equals $30.00; X equals $0.54 plus, my base or regular hourly wage for that week.

I am to be paid one and one-half times my regular hourly rate for each work week for all hours in said work week in excess of 40 hours.

4. It is further agreed that in the event the weekly regular hourly wage, determined in accordance with the above indicated formula and agreement, shall in any work week equal less than 30 cents per hour, then 30 cents per hour shall be the regular hourly wage for the first 40 hours worked in that week, and 45 cents per hour shall be the overtime hourly wage for all hours in said week in excess of the 40. Also, only such time as I may actually spend in actually working on said lease as a pumper shall be considered as my work time for which you are obligated to pay me. All time spent at home, sleeping, and for meals, away from the lease, working around my house or in the garden, working for myself or others, etc., shall not be charged to you.

This agreement shall cancel any and all prior agreements between us (if any). There are no other oral or written understandings regarding this agreement, or my employment.

H. J. FARRAR, Employee.

Accepted on above date:

HELMERICH & PAYNE, INC.,
By JOHN MCMASTERS,
Company's Representative. (1-B)

HELMERICH & PAYNE, INC.

LABOR TIME SHEET

EXJ (151)

NAME H. J. FARRAR

ADDRESS GALVA, KANS.

PERIOD FROM March - 16 1942 TO March - 29 1942 SOCIAL SECURITY NO 437-10-9796

OCCUPATION LEASE PUMPER X ROUSTABOUT ☐ CABLE DRILLER ☐ TOOL DRESSER ☐ OTHERS

DATE		WORK DONE		LEASE CHARGE	REG HOURS	O T HOURS	RATE	AMOUNT
16	MON	Pumping	Wells 5 Wells Russell C	Russell-B-B-5A	10			
17	TUE	Pumping	Wells 4 wells Russell B	Russell-B-C-9A	10			
18	WED	Pumping	Wells 1 Well Russell B	Russell-B-C-5A	10			
19	THU	Pumping	Wells	Russell-B-C-5A	10			
20	FRI	Pumping	Wells	Russell-B-C-5A		10		
21	SAT	Pumping	Wells	Russell-B-C-5A		10		
22	SUN	Pumping	Wells	Russell-B-C-5A		10		
23	MON	Pumping	Wells	Russell-B-C-5A	10			
24	TUE	Pumping	Wells	Russell-B-C-5A	10			
25	WED	Pumping	Wells	Russell-B-C-5A	10			
26	THU	Pumping	Wells	Russell-B-C-5A	10			
27	FRI	Pumping	Wells	Russell-B-C-5A		10		
28	SAT	Pumping	Wells	Russell-B-C-5A		10		
29	SUN	Pumping	Wells	Russell-B-C-5A		10		
X-14	X-14	Russell	a 38 93 B 31.12 C 7.79	TOTAL PAYROLL REG	80		458	36 64
				O T		60	687	41 22
				TOTAL EARNINGS	80	60		77 86

I HEREBY CERTIFY THAT THE ABOVE IS A CORRECT STATEMENT OF ALL TIME WORKED BY ME IN THE SERVICE OF THIS COMPANY DURING THE PERIOD SHOWN

SIGNED W J Farrar

(MUST BE PERSONALLY SIGNED BY EMPLOYEE)

SIGNED THIS 29 DAY OF March 1942

APPROVED

APPROVED

DEDUCTIONS	AMOUNT
PAID BY DRAFT NO.	
LEASE HOUSE RENTALS	
FEDERAL O A B TAX	78
OTHERS	
TOTAL DEDUCTIONS	78
BALANCE DUE	77 08

(1-8)

57

SEMI-MONTHLY TIME SHEET

Company Owning Lease: Frank Driver & Helpers — Name of Lease — Well No. — Company No. 70

First Half Month of December 1948 — Foreman J.T.M.

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total No. Days	RATE	AMOUNT
K O Farmer	Drlr #3																15	165.00	82 50
Frank Wilson	Drlr #1																15	165.00	82 50
J R Haney	Drlr 8																15	165.00	82 50
Floyd Graham	Drlr 14																15	165.00	82 50
Jack Sisk	Helper #13																15	5.00	75 00
Jim Kelehan	Helper #14																15	5.00	75 00
Jimmy Garrett	Helper #8																15	5.00	75 00

abla 750 / 450.00 / Drlr

DEDUCTIONS			
NAME	Ded'n.	Amount	
Jimmy Garrett	Loan	5 00	Pay J.T.M.
O.A.B.		5 57	

TOTAL PAY ROLL	553 00
TOTAL DEDUCTIONS	557
BALANCE DUE	54443

3-A

Ex K

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

J. T. Musgrove
Supt. or Foreman

Standard Form Commercial Pay Co.

SEMI-MONTHLY TIME SHEET

Company

Company Owning Lease: First

Name of Lease: Trucks

Well No.

Half Month of: April 1940

Foreman: Herman Alves

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total No. Days	RATE	AMOUNT
T Farias	Truck #24	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/	15	4.50	67.50
J B Waldron	Lease #24	/	/	/	/	/	/	/	/	/	/	/	/	/	/	/	15	5.00	75.00

DEDUCTIONS

NAME	Draft No.	Amount
O A B		1.52

X-17

TOTAL PAY ROLL	157.50
TOTAL DEDUCTIONS	1.52
BALANCE DUE	155.98

3-B

Ey X

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

Herman Alves

Supt. or Foreman

SEMI-MONTHLY TIME SHEET

Company Owning Lease: Helmerich & Payne Inc Contractor

Name of Lease: [redacted] Well No. 14 Casing No.

First Half Month of August 1940 Foreman Farrest Roper

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total No. Days	RATE	AMOUNT
J.M. Woods	Truck 19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	15	12 00	87 50
V.A. McCraw	Swamp 19	X	X	X	X	X	X	X	X	X	X	X	X	X	X		15	150 00	25 00
BB Robinson	Truck 16	X	X	X	X	X	X	X	X	X	X	X	X	X	X		15	165 00	82 50
G.C. Gardner	Swamp 26	X	X	X	X	X	X	X	X	X	X	X	X	X	X		15	150 00	25 00
M.L. Wright	Truck 21	X	X	X	X	X			X	X	X	X	X	X	X		13	150 00	71 50
W. Smith -	Swamp 21	X	X	X	X	X					X	X	X	X	X		11	150 00	
W. Smith -	Truck 5						X	X	X	X							4	150 00	77 00
Harold Byerly -	Truck 5	X	X	X	X	X					X	X	X	X	X	X	11	150 00	
Harold Byerly -	Truck 21						X	X	X	X							4	150 00	82 50
Ray Smith	Swamp 5	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	15	150 00	25 00
Bryan Moffett	Truck 20	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	15	165 00	82 50
Shirley Blythe	Swamp 20	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	15	150 00	75 00

DEDUCTIONS

NAME	Draft No.	Amount
M.L. Wright	2	2 73
Harold Byerly	✓	2 90
Bryan Moffett	✓	2 00
B.B. Robinson	✓	1 00
O.A.B.		7 86
		16 49

TOTAL PAY ROLL	783 00
TOTAL DEDUCTIONS	16 49
BALANCE DUE	767 01

BC

X17 Jake Ep

Ex K

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

Farrest Roper
Supt. or Foreman

SEMI-MONTHLY TIME SHEET

Company Owning Lease: Sinclair — Name of Lease: Frank Owens — Company: 10 — Well No. — String No.

First Half Month of Nov 1940 — Foreman

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total No. Days	RATE		AMOUNT
Clair Wilson	Tk Gauger	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	180	75 105	25 35	87.50
J R Haney	" "	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	180	75 105	25 35	87.50
Wess Ketchum	Helper	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	180	75 105	25 35	75.00
Clarence S Wilson	"	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	180	75 105	25 35	75.00

DEDUCTIONS

NAME	Draft No.	Amount
O.A.B.		3.16

X17 — Okla

TOTAL PAY ROLL	315.00
TOTAL DEDUCTIONS	3.16
BALANCE DUE	311.84

3-E

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

J M Burgess
Supt. or Foreman

"Exhibit L"

76

SEMI-MONTHLY TIME SHEET — HELMERICH & PAYNE, INC.

Frank Ry Lodge

Track F-25

Name of Lease

Well No. — Rig No.

Last Half Month of April 1941 — Foreman A.R. Coleman

NAME	OCCUPATION	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Hrs.	S.T. O.T.	RATE S.T.	RATE O.T.	AMOUNT
Frank Ritchey	Driller	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	120				84.60
L.P. Martin	Helper	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	120				75.00

3-7

DEDUCTIONS

NAME	Deduction No.	Amount
O.A.B.		1.53

OFFICE DISTRIBUTION

7-17

N Mex

AMOUNT		
157.60	TOTAL PAY ROLL	157.60
	TOTAL DEDUCTIONS	1.63
	BALANCE DUE	155.97

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

A.R. Coleman
Dept. or Foreman

"Exhibit 4"

SEMI-MONTHLY TIME SHEET — HELMERICH & PAYNE, INC. — 3

Truck #25.

Last Half Month of May 1941 Foreman A.R. Coleman

NAME	OCCUPATION	7 8 9 10 11 12 1 2 3 4 5 6 7	Total Hrs.	RATE S.T.	RATE O.T.	AMOUNT
Frank Wilson.	Driver.	10 10 10 9 2 15 7 12 8 11 14 8 11 14	167			80 80
M. H. Smith	Helper.	10 10 10 8 2 15 7 12 8 11 14 8 11 14	167			74 00

DEDUCTIONS

NAME	Dwk No.	Amount
O.A.B.		155

OFFICE DISTRIBUTION

K-17 2nd approx

3-I

AMOUNT		
	TOTAL PAY ROLL	154 80
	TOTAL DEDUCTIONS	155
	BALANCE DUE	153 79

Ex M

I hereby certify that the men above named have been employed in the service of this Company and that the time and rates shown above are correct.

A.R. Coleman
Supt. or Foreman

LABOR TIME SHEET

HELMERICH & PAYNE, INC.

64

Common Owning Lease

Name of Lease or Well: Hemrick

Well No.

Survey No.

Permit From 3 - 2 1942 To 3 - 15 1942 Foreman Herman Owens

Name of Lease or Well

Well No.

Rig No.

NAME	OCCUPATION	1	2	3	4	5	6	7	8	9	10	11	12	13	14	Total Hours	RATE	AMOUNT	TOTAL EARNINGS
Byron Shattuck	Truck 38	9	8	8	0	9	10	9	10	8	10	10	10	8	10	120	.64	76.80	
Ernest Robertson	Swamper 38	9	8	8	0	9	10	9	10	8	10	10	10	8	10	120	.55	66.00	80.80
W.E. Smith	Truck 40	10	8	0	11	5	13	10	8	9	10	8	10	8	10	130	.64	83.20	74.40
Mort Cuddihee	Swamper 40	10	8	0	11	5	13	10	8	9	10	8	10	8	10	130	.55	71.50	71.50

OFFICE DISTRIBUTION	AMOUNT
X-17 Truck expense Okla	30.60

DEDUCTIONS		TOTAL PAYROLL
Name of Item	Check No. - Amount	
O & B	3.10	

Eq M Okla

Employee's Position O. K.

I hereby certify that the men above named have been employed in the service of this Company, and that the time and rates shown above are correct.

Herman Owens

SUPT. OR FOREMAN

3-14

Total Advertising 3.10

BALANCE DUE 30.60

Findings of Fact and Conclusions of Law.

131 The court having heard the evidence and argument of counsel in this cause, and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

Findings of Fact.

I.

The defendant is a corporation organized and existing under the laws of the State of Delaware, and has a permit to do business in the State of Oklahoma, its principal offices being located in the City of Tulsa, Tulsa County, Oklahoma. The corporate setup of the defendant was altered subsequent to October 24, 1938, (the effective date of the Fair Labor Standards Act of 1938), hereinafter referred to as the Act), but the parties have stipulated and the court finds that such alteration may be disregarded for the purpose of the disposition of this case. The business of the defendant consists of the drilling of oil and natural gas wells, both under contract with other concerns and individuals and for its own account, and the production of crude petroleum, oil and natural gas from wells drilled on properties owned or leased by it. Most of the drilling operations are performed for others. Both drilling and producing operations are performed in various states, including Oklahoma, Texas, New Mexico and Illinois.

II.

Substantially all of the oil and gas produced from wells drilled by the defendant, whether for others or on its own account, moves into the channels of interstate commerce, either in its crude form or as products.

III.

132 In the prosecution of its various activities the defendant employs an average of approximately 400 employees in the production of goods for commerce or in processes or occupations necessary thereto. Of this number, approximately 305 are normally employed in drilling operations and occupations necessary and incidental thereto; approximately 70 are normally employed in production activities and occupations necessary and incidental thereto;

and approximately 25 are employed in clerical work in connection with both the drilling and producing activities of the defendant.

IV.

During the period beginning October 24, 1938, and extending up to and including the date of the trial of this case, the defendant has employed its employees under various contracts of employment, some of which contracts were written and some oral, providing for various wage plans as will be hereinafter found. The underlying purpose and the practical effect of these respective wage plans effective prior to July 15, 1941, were to maintain employees' wages *as* same level as before the Act went into effect.

V.

During the period of time from October 24, 1938, to October 16, 1939, the defendant's drilling employees; that is, rotary drillers, rotary helpers, roustabouts, water pumpers, and watchmen, were employed under a wage plan or contract which was evidenced by a written endorsement stamped on the back of each pay check issued to each such employee during the period mentioned. This written endorsement was as follows:

"By endorsement of this check employee acknowledges that from 11/1/38, he is employed by Helmerich & Payne, Inc., on the following wage scale:

The base or regular rate per hour shall be paid for the first 4 hours in each 8 hour tour, and hours (in each said 8 hour tour) in excess of the four shall be paid for at 1½ times base or regular rate. Base rate shall never apply to more than 44 hours in any calendar week.

133 Base or regular rates are as follows:

Rotary Drillers	$1.10
Rotary Helpers	.70
Roustabouts	.48
Water Pumpers	.45
Watchmen	.28

If your particular work does not come under the above classifications, consult your foreman for your rate."

The result of this method of payment was that each of these employees continued to receive the same wages for a like amount of work as they received before the effective date of the Fair Labor Standards Act of 1938, hereinafter called the Act.

VI.

The wage plan mentioned in paragraph V above (modified to provide that base pay should not be paid for more than 42 hours in any calendar week) was continued in effect as to the classes of employees named during the period of time from October 16, 1939, to October 1, 1940, the respective basic hourly rates remaining the same as to all such employees except watchmen, whose basic hourly rate was increased from twenty-eight (28) cents to thirty (30) cents per hour.

VII.

During the period of time mentioned in Paragraphs V and VI above, the employees therein mentioned regularly worked hours in excess of the applicable maximum per workweek as provided in Section 7 of the Act, and during such period received only such compensation as was provided in the endorsement referred to.

VIII.

During the period of time from October 24, 1938, to October 1, 1940, the defendant employed its lease pumpers and switchers, and also its truck drivers and helpers, under oral contracts of employment providing in the case of each such employee for a fixed *monthly* salary irrespective of the number of hours worked during any workweek. During this period of time such employees frequently worked hours in excess of the maximum prescribed by the Act, each such employee receiving only his fixed monthly salary re-
134 gardless of the number of hours worked, but said monthly salary always exceeded the statutory minimum wages both as to time and overtime, which said employee would have received if he had been paid by the hour.

IX.

During the period of time from October 1, 1940, to July 15, 1941, the defendant employed its drilling and production employees; that is, rotary drillers, rotary helpers, cable

drillers, tool drillers, mechanics, roustabouts, water pumpers, watchmen, truck drivers, swampers, and lease pumpers under written contracts of employment. A typical example of such contracts is the following:

Employment Contract No. 529.

Place Salem, Illinois Date Sept. 4, 1940

Helmerich & Payne, Inc., 415 Philtower, Tulsa, Oklahoma.

Gentlemen: I hereby accept employment with you as a Rotary Helper upon the following wage scale and conditions, to-wit:

The base or regular rate per hour for employees coming under classifications 1, 2, 3, 4, 5, 6, 7 and 10 below shall be paid for the first 4 hours in each 8 hour tour and hours (in each said 8 hour tour) in excess of the 4 shall be paid for at 1½ times said base or regular rate.

The base or regular rate per hour for employees under classifications 9, 11, and 12 below shall be paid for the first 5 hours in each 12 hour tour and hours (in each said 12 hour tour) in excess of the 5 shall be paid at 1½ times base or regular rate.

The base or regular rate per hour for employees under classification 8 noted below shall be paid for the first 5 hours in each 10 hour tour and hours (in each said 10 hour tour) in excess of the 5 shall be paid for at 1½ times base or regular rate.

In event each monthly compensation of any employee of the following classifications:

Lease Pumpers	(classification No. 8)	$130.00
Truck Drivers	(classification No. 11)	165.00
Swampers	(Classification No. 12)	150.00

does not equal the sum hereinabove set opposite the same, the Company will advance said employee the difference which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases.

Base or regular hourly rates are as follows:

Classification	1 Rotary Driller	$1.10
"	2 Rotary Helpers	.70
"	3 Cable Driller	1.00
"	4 Tool Dresser	.80
Classification	5 Mechanics	.70
"	6 Roustabouts (in Kansas & Texas)	.48
"	7 Water Pumpers	.45
"	8 Lease Pumpers	.34
"	9 Watchmen	.30
"	10 Roustabouts (in Okla. & Illinois)	.50
"	11 Truck Drivers	.35
"	12 Swampers	.32

135 Base rate shall never apply to more than 40 hours in any work week.

I agree to make daily reports to your home office at 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

It is understood that you may terminate my employment at any time either with or without cause and either with or without notice as you may in your uncontrollable discretion from time to time determine.

W. E. BECHTEL, Employer.

Witnesseth:

CHAS. STALEY, Company's Representative"

During the period of time when these contracts were in effect, no sums advanced to any employee in accordance with the provisions thereof were ever repaid, and the defendant never had any accounting with any such employee with reference thereto.

While these contracts were in effect, the employees who parties thereto frequently worked hours in excess of the maximum prescribed by Section V of the Act, and received therefor such compensation as was provided by the contracts.

X.

During the period of time from July 16, 1941, to the date of trial, the defendant employed its drilling employees un-

der written contracts of employment. A typical example of such contracts is the following:

"Helmerich & Payne, Inc.

General Employment Contract.

Place South Maud . Dated 9/28/41

Helmerich & Payne, Inc., 415 Philtower, Tulsa, Oklahoma.

No. G 726

Gentlemen: I hereby accept employment with you as a Rotary Driller upon the following wage scale and conditions, to-wit:

136 1. The base or Regular rate per hour for all classes of employees covered by this contract shall be paid for the first 40 hours worked in each calendar week and all hours in said week in excess of said 40 shall be paid for at one and one-half times said Base or Regular rate. Wages shall be paid bi-weekly, (every 2 calendar weeks).

2. In the event any said bi-weekly compensation of any employee of the following classifications:

Truck Drivers	Classification 7	$80.00
Swampers	Classification 8	74.00
Tanden Truck Drivers	Classification 9	92.30

does not equal the sum hereinbefore set opposite the same, the company may advance and loan said employee the difference, which shall apply on future overtime payments; adjustments and accounting to be made on the first day of each year (or sooner if the company desires) and/or when said employment ceases.

3. Base or Regular hourly rates are as follows:

Classification 1 Rotary Driller.	$1.33 1/3
Classification 2 Rotary Helper, except in Ill	.82
Classification 3 Cable Driller	1.25
Classification 4 Tool Dresser	1.00
Classification 5 Rotary Helper in Illinois	.85
Classification 6 Roustabouts	.58
Classification 7 Truck Drivers	.46
Classification 8 Swampers	.42
Classification 9 Tandem Truck Drivers	.52

'Rotary Helper', under Classifications 2 and 5 shall mean and include Derrick Men, Floor Men, Motor Men and Mechanics.

4. Time spent by employees under Classifications 7, 8 and 9, in going to and from work, sleeping, eating, going to and from meals, doing work for themselves and others, shall not for any purpose be considered work time.

5. If, in any calendar week, employee shall work under other than his original classification, his pay for that work time shall be determined, both for regular time and over-time so worked, on the above stated rate for that classification.

6. I agree to make written, signed daily reports to your home office, 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

7. It is understood that this agreement shall be effective (as to present employees executing same) as of and from July 16, 1941; that there are no oral or written understandings regarding same and it shall cancel any and all prior agreements between us (if any). You may terminate my employment at any time, either with *our* without cause, and either with or without notice, as you may in your uncontrollable discretion from time to time determine.

H. H. Rich, Employee.

Accepted on Above Date:

Helmerich & Payne, Inc.,
By C. L. McKee, Company's Representative.

137 During the period of time while these contracts were in effect no sums advanced in accordance with the provisions thereof were ever repaid to the defendant and no accounting was ever had with respect thereto.

During the period of time while these contracts were in effect, the employees who were parties thereto frequently workd hours in excess of the maximum per workweek as prescribed by Section 7 of the Act, and received therefor only such compensation as was provided for in such contracts. They occasionally worked such hours as would *entitled* them to compensation in excess of the amounts actually received.

XI.

During the period from July 16, 1941, to the date of the trial, the defendant employed its lease pumpers under written contracts of employment. A typical example of such employment contracts is the following:

"Helmerich & Payne, Inc.

Full Time Lease Pumper's Contract.

Place Galva, Kns. Date 10-6-41

Helmerich & Payne, Inc., 415 Philtower, Tulsa, Oklahoma.

No. P 33

Attention: Production Superintendent

Gentlemen: I hereby accept employment with you as a full time lease pumper to pump and look after your Russell-B-C-5A Lease ....., in McPherson, Kns., County, McPherson, on the following wage scale and conditions, to-wit:

1. You will pay me $38.93 per week, payable bi-weekly (every two weeks).

(A) You will permit me to use, as long as I am in your employ on said lease, the lease house (as is) on said lease, if same is available, and also permit me, at my own risk, cost and expense, to use for my domestic purposes only, such gas as is in your sole discretion available from such lease; and also furnish lights for said house if same are (in your discretion) available at reasonable domestic rates and without cost to you of extending lines; for which I agree to pay you the sum of $2.00 per week, which you may deduct from my pay check.

138 2. I agree to promptly make written, signed daily reports to your home office, 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ, and it is understood that you may terminate my employment at any time, either with or without cause, and either with or without notice, as you may in your uncontrollable discretion from time to time determine, in which event I agree to promptly and immediately vacate the premises in its original condition, ordinary wear and tear excepted.

3. The number of hours which I work on this lease will, no doubt, vary to some little extent from week to week. Un-

der the Federal Fair Labor Standards Act my pay may not be less than thirty (30) cents per hour for the first 40 hours in each said work week, and forty-five (45) cents per hour thereafter in said workweek. Except as otherwise hereinafter provided I am not being employed on a specific rate per hour, but I am being employed with the understanding that the above indicated pay shall completely cover and include (subject to Paragraph 4) my regular time and overtime in each work week, and that my regular hourly rate per each work week shall be determined each said work week by the following formula:

> Let X equal my regular or base hourly wage for each work week. X shall then be determined by multiplying X by the number of hours in each week which I work up to the first 40 and adding to it the number of hours worked in said work week in excess of said 40 hours time 3X/2, which shall equal the compensation I receive for that week.

In other words, if, for the first week I work, I receive the sum of $30.00, and I worked 50 hours in that week, my regular hourly rate scale for that week would be determined as follows:

> 40X plus 15X equal $30.00, or 55X equals $30.00; X equals $0.54 plus, my base or regular hourly wage for that week.

I am to be paid one and one-half times my regular hourly rate for each work week for all hours in said work week in excess of 40 hours.

4. It is further agreed that in the event the weekly regular hourly wage, determined in accordance with the above indicated formula and agreement, shall in any work week equal less than 30 cents per hour, then 30 cents per hour shall be the regular hourly wage for the first 40 hours worked in that week, and 45 cents per hour shall be the overtime hourly wage for all hours in said week in excess of the 40. Also, only such time as I may actually spend in actually working on said lease as a pumper shall be considered as my work time for which you are obligated to pay me. All time spent at home, sleeping, and for meals, away from the lease, working around my house or in the

garden, working for myself or others, etc., shall not be charged to you.

This agreement shall *cancell* any and all prior agreements between us (if any). There are no other oral or written understandings regarding this agreement, or my employment.

H. J. FARRAR, Employee.

Accepted on above date:
HELMERICH & PAYNE, INC.,
By 6 JOHN MCMASTERS,
Company's Representative."

During such period of time the employees who were parties to such contracts frequently worked hours in excess of the maximum per workweek prescribed by Section 7 of the Act, receiving therefor only such compensation as was provided for in said contracts.

139 That at *lease* some of the employees employed under the contracts mentioned above were not able to fully and clearly interpret the meaning of such 'X-formula contract' and did not clearly understand what their regular hourly rate of pay was thereunder. They understood however, that their wages were to remain the same each week, regardless of hours worked, and further understood and agreed that the pay they were getting was to include and cover both their regular time and overtime for each workweek.

XII.

The parties hereto having filed stipulations of facts in this cause, such stipulations are hereby adopted and made a part of these findings.

Conclusions of Law.

I.

I conclude that the defendant has been and is employing its employees in the production of goods for interstate commerce or in processes or occupations necessary to such production within the meaning of the Fair Labor Standards Act of 1938.

II.

I conclude, in view of the decision of the Supreme Court in the case of Walling v. A. H. Belo Corporation, 62 Sup. Ct. 1223, that employees of the defendant employed pursuant to the contracts set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein have been employed in compliance with the requirements of Section 7 of the Fair Labor Standards Act of 1938, in that all such contracts provide "base or regular hourly" rates of pay and overtime at time and one-half thereon.

III.

I conclude, in view of the decision of the Supreme Court in the case of Overnight Motor Transportation Co. v. Missel, 62 Sup. Ct. 1216, that the employees of the defendant employed pursuant to the contract set forth in Paragraph VIII of the Findings of Fact herein have been employed in violation of the requirements of Section 7 of the Fair Labor Standards Act of 1938, in that such contract fails to provide for the payment of overtime compensation at one and one-half times the employees' regular rate of pay.

IV.

140 The plaintiff is not entitled to an injunction in this cause except to the extent of restraining defendant from paying any of its employees in the manner prescribed in Paragraph VIII of the Findings of Fact.

Dated this 4 day of Dec., A. D. 1942.

ROYCE H. SAVAGE,
United States District Judge.

Endorsed: Filed Dec. 4, 1942. H. P. Warfield, Clerk, U. S. District Court.

Judgment.

141 This cause came on for trial on the 13th day of May, A. D. 1942, on which date it was duly adjourned to the 19th day of September, A. D. 1942, and the plaintiff appearing by his counsel of record, Llewellyn B. Duke and Earl Street, and the defendant, Helmerich & Payne, Inc., a corporation, being present by W. H. Helmerich, its presi-

dent, and Settle, Monett & Clammer, its duly authorized attorneys of record, and the court having heard the evidence and the argument of counsel and being fully advised in the premises, did on the 19th day of September, A. D. 1942, make and enter its findings of fact and conclusions of law, such findings and conclusions being incorporated into this judgment by reference as if fully set out herein; it is therefore

I.

Ordered, Adjudged, and Decreed by the court that the injunction sought by the plaintiff in this cause be, and the same is hereby in all things denied except as hereinafter specified; it is

II.

Ordered, Adjudged and Decreed that the defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf or interest, be, and they are hereby, permanently enjoined and restrained from violating the Fair Labor Standards Act of 1938, hereinafter referred to as the Act, in the following manner:

The defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined
142 by the Act, for a workweek longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed; provided, however, that this injunction and restraint shall not be deemed to prohibit the employment and compensation of employees by the defendant pursuant to contracts in the forms set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein.

III.

The defendant shall not, contrary to Section 15(a)(1) of the Act, ship, deliver, transport, offer for transportation or sell in interstate commerce, as defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in Paragraph II of this judgment;

The defendant shall not fail to make, keep, and preserve records of its employees and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Section 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

It is further ordered that all costs incurred herein be, and they are hereby, assessed against the defendant.

Dated this 4th day of Dec. A. D. 1942.

ROYCE H. SAVAGE,
United States District Judge.

Endorsed: Filed (Dec. 4, 1942). H. P. Warfield, Clerk, U. S. District Court: Recorded: Journal 5, Page 849.

Notice of Appeal.

143 Notice is hereby given that L. Metcalfe Walling, as Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from that part of the judgment entered in this action on the fourth day of December, 1942, which reads:

"1.

"Ordered, Adjudged, and Decreed by the Court that the injunction sought by the plaintiff in this cause be, and the same is hereby in all things denied except as hereinafter specified;"

and from that part of said judgment which reads:

"provided, however, that this injunction and restraint shall not be deemed to prohibit the employment and compensation of employees by the defendant pursuant to contracts

in the forms set forth in Paragraphs V, VI, IX, X, and XI of the Findings of Fact herein."

IRVING J. LEVY, Acting Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
EARL STREET, Attorney,
United States Department of Labor
Attorneys for Plaintiff.

Post Office Address:

c/o Wage and Hour Division, U. S. Department of Labor, Rio Grande National Building, Dallas, Texas, or c/o Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

Endorsed: Filed February 13, 1943. H. P. Warfield, Clerk, U. S. District Court.

Designation of Record.

146 To the Clerk of the above named Court: In accordance with Rule 75(a) of the Federal Rules of Civil Procedure, you are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Tenth Circuit, pursuant to the Notice of Appeal filed in the above entitled cause, and to include in such transcript of record the following, which constitutes the complete record and all the proceedings and evidence in this action.

1. Appellant's complaint.

2. Appellee's answer.

3. Stipulation dated January 28, 1942, for substitution of Thomas W. Holland as plaintiff.

4. Order entered January 28, 1942, substituting Thomas W. Holland as plaintiff.

5. Stipulation dated March 25, 1942, for substitution of L. Metcalfe Walling as plaintiff.

6. Order entered March 25, 1942, substituting L. Metcalfe Walling as plaintiff.

7. Stipulation of fact executed by the parties and filed

and introduced in evidence at the trial, including copies of the exhibits attached thereto.

147 8. Complete stenographic transcript of proceedings and evidence had and taken before the Honorable Royce H. Savage, United States District Judge, on May 13, 1942, including a copy of plaintiff's exhibit No. 1.

9. A copy of the final judgment entered by the District Court.

10. A copy of the findings of fact and conclusions of law filed by the District Court.

11. Notice of Appeal with date of filing.

12. Statement of points to be relied upon on appeal.

13. Designation of Record and proceedings to be contained in the record on appeal.

14. Affidavit of service of Designation of Record, and of Statement of Points to be relied upon on appeal.

Said transcript is to be prepared as required by law and the rules of this Court, and the Federal Rules of Procedure, and is to be filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit at Denver, Colorado, on or before the 25th day of March, 1943.

IRVING J. LEVY, Acting Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
EARL STREET, Attorney,
United States Department of Labor
Attorneys for Plaintiff.

Post Office Address:

c/o Wage and Hour Division, U. S. Department of Labor, Rio Grande National Building, Dallas, Texas, or c/o Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

Endorsed: Filed February 13, 1943. H. P. Warfield, Clerk U. S. District Court.

Affidavit of Service of Designation of Record and Statement of Points to be Relied Upon on Appeal.

State of Texas, County of Dallas, ss.

148 Earl Street, of lawful age, being first duly sworn on oath says:

That he is one of the attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, and that he did serve a copy of the Designation of Record and proceedings to be contained in the record on appeal, and a true and correct copy of Statement of Points to be Relied Upon on Appeal, on the Honorable Eugene Monette, one of the attorneys of record for the defendant, Helmerich and Payne, Inc., by depositing a true, full, and correct copy of such Designation of Record and proceedings on appeal, and a true and correct copy of such Statement of Points to be Relied Upon on Appeal in the United States mail with postage prepaid addressed to the said Eugene Monette at his office in the Philtower Building in the City of Tulsa, Oklahoma, his last known address.

Further affiant saith not.

EARL STREET.

Subscribed and sworn to before me this 12 day of February, A. D. 1943. E. F. Roberson, Notary Public in and for Dallas County, Texas. (Seal)

Endorsed: Filed February 13, 1943. H. P. Warfield, Clerk, U. S. District Court.

[Transcript of Proceedings.]

93 Be It Remembered, That on this 13th day of May, 1942, the above entitled and numbered cause came on for trial before the Honorable Royce H. Savage, United States District Judge, for the Northern District of Oklahoma, at Tulsa, in said district, whereupon the following proceedings were had and done, to-wit:

Appearances: Mr. Llewellyn B. Duke, of Dallas, Texas, Regional Attorney for the Wage and Hour Division, U. S. Department of Labor, and Mr. Earl Street, of Dallas, Texas,

Attorneys for the Plaintiff. Mr. Eugene O. Monnet, of Tulsa, Oklahoma, Attorney for the Defendant.

The Court: Do you care to make a statement, Mr. Duke?

Mr. Duke: Yes, Your Honor. There has been prepared and approved by counsel a stipulation which I will ask to be filed and incorporated in the record in this case.
94 That stipulation, Your Honor, sets out with considerable particularity the operations of the defendant, and the various plans and methods of employment and payment of its employees that transpired since the effective date of the Act in October, 1938, and up to and including the present time, and I would like to summarize to Your Honor very briefly what is contained therein.

The Court: I would be glad if you would.

Mr. Duke: We have discussed it heretofore on the pretrial conference. The defendant is *admitedly* engaged in the production of oil for interstate commerce, and the commerce question is therefore out of this case, having been admitted. At the effective date of the Act, or just prior thereto, prior to October of 1938, the defendant then unquestionably in anticipation of the effectiveness of the Act prepared a form of endorsement and a stamp containing that form of endorsement to be stampted on its pay checks, Now that form of endorsement was used on checks for the payment of drilling employees, and I think it might be helpful to Your Honor if I read them to you. That applied to Rotary Drilling, Rotary Helpers or roughnecks, Cable Drillers, Tool Dressers, Roustabouts in Texas, Kansas, Oklahoma and Illinois; and Water pumpers. It provided, the endorsement provided for the payment of straight time for the first four hours in each eight hour tower, and time and a half for the next four hours, and setting up a base rate of pay, and admittedly that hourly rate of pay was such
95 a rate of pay that it resulted in the employee receiving the same rate of pay per tower or per day he had formerly received.

Then in October, 1939, the same endorsement was used. The only change was that the rate of payment of the watchmen, the base rate of pay per hour of the watchmen was raised from 25 to 30, with the additional provision that it included overtime after 42 hours, the first step down of the Act having occurred at that time from 44 to 42.

Then in September of 1940, for the first time, another form of contract was employed. It is found in the stipulation as Exhibit "C". That was a written contract, a printed form of contract, which was submitted to the employees, signed by them, and returned to the company. The method of endorsement theretofore being used being abandoned. In that contract some material changes occurred. Of course at that time we had gotten down to the 1940 hour period, and this was, of course, in contemplation of unquestionably that going into effect, of the 1940 minimum in the work week. Leasg pumpers are included for the first time, and this provision appears. You still go on with the four-four daily plan for employees on the drilling crews, but with reference to the lease pumper a five-five plan is originated and shows up for the first time. That is, they receive straight time for the first five hours work in each day, and time and a half for the next five hours work in each day, and a basic wage rate is set up, among others, for these pumpers in that contract.

Now this provision also appears for the first time. A guarantee wage as to lease pumpers, truck drivers
96 and swampers; a monthly salary appears opposite those three classifications; with the provision that if that monthly salary does not equal the same, or if the return from the hourly rate of pay does not equal the monthly salary that the employer will advance them the difference, and adjustments to be made on January first of each year, and when such employment ceases. It is our contention, of course, that that is in effect a guaranteed monthly salary.

Then the following year in 1941, and the date which we state in the stipulation to be July 16th of 1941, a new contract was entered into, and that contract did not include lease pumpers, a separate written contract being used for them. The same provision with reference to truck drivers and swampers, with a guarantee salary provision payment in there, and there is no change as to the drilling employees proper. That is contained on Exhibit "E". Then with reference to the lease pumper, a contract was simultaneously entered into as a separate printed form of contract which provided, stated this: I agree to work for so much a week, a stated sum being used, and stating that the basic rate of

pay would be that figure which would be determined by the hour in the algebraic formula "X", being the rate of pay per hour which when applied to straight time for the first 40 hours, and time and a half for the number of over-time work, would equal the agreed weekly salary. Now briefly Your Honor that is the position up to date.

The Court: What do you say the violation consisted of?

97 Mr. Duke: I say the violations consist of failure to pay over-time with reference to all of these employees to the date of this last contract, where, with reference to the drillers, the proper correction was made, and I omitted to tell Your Honor that. With reference to the drilling employees the contract shows they are properly compensated, and have been since July 16, 1941, but with reference to the other employees, the contained over-time is not being paid in accordance with the provisions of the Act, because they are not being paid time and a half. The truck drivers, swabbers and helpers are being paid a guaranteed monthly salary, with a fictitious hourly rate of pay. And we maintain that the same violation of the over-time provisions are still in existence up to today with reference to these lease pumpers. Whenever they work any over-time they are getting the same return each week regardless of the number of hours worked, and admittedly go under the terms of the contract, the weekly rate being fixed each week by the use of the algebraic formula.

The Court: Has the Circuit Court of Appeals passed on this?

Mr. Duke: Yes, it has been argued and I am looking for an opinion Monday. It was argued the first Monday in April. Now briefly that is our case, Your Honor.

The Court: Now the sum and substance of your complaint is that the defendant has entered into a contract with these employees which in effect set up fictitious hourly rates of pay, and guaranteed certain monthly or semi-monthly salaries?

98 Mr. Duke: Yes, sir.

The Court: That is just about the whole story.

Mr. Duke: Yes, sir. That would be true as to the pumpers also where the formula was used.

The Court: Do you think the position with their present contract is O. K.?

Mr. Duke: No, sir, the present contract with the pumpers I think is even more—

The Court: Now which class of employees?

Mr. Duke: I see what Your Honor means. We think that since the July 16, 1941, contracts were entered into that the contract with reference to the drillers is all right, but that the contracts with reference to the pumpers are even today fictional.

The Court: All right, do you care to make a statement before evidence is presented, Mr. Monnet?

Mr. Monnet: I will just make a brief statement more for the record. Of course the defendant is engaged in the principal business of drilling contractors. They are also oil producers, and we have stipulated that the oil which we produce does find its way into interstate commerce, probably every drop of it. We operated during the period over which this litigation is involved, we have operated 15 to 30 drilling crews, Rotary rigs which employ 18 men a day, and from 5 to 12 cable tools. Of course our business on the drilling end of it is mainly for hire to companies and individuals, and probably half of the wells we drill or
99 more, are dry holes. The others produce oil sold to pipe lines and goes to refineries and into interstate commerce.

Now when this Act was first passed a great many of the companies in our business didn't know and didn't pay any attention to it, but for some reason or other it came to our attention, and several weeks before it became effective the Board of Directors of the company went into conference of how to arrange our wage scale and so on to comply with the Act, and they conferred among themselves and with their counsel over a period of a couple of weeks, and finally worked out this form of check endorsement, which in the opinion of their counsel at the time, it was a brand new Act, nothing like it before, they thought was in compliance with the Act.

Of course in this particular type of business the wage scale is so high, it wasn't a question of complying with the

minimum wage scale, just a question of complying with Sections 6 and 7 of the Act, and doing it in such a way as not to hurt the men or the company. So this plan was suggested and approved by their attorneys, and was inaugurated, this check endorsement, which you might call the split day plan. In other words, the payment of over-time on a daily basis. And that continued until July 16, 1941, at which time it was changed to the present plan.

Now then with the exception of the pumpers, watchmen, and water pumpers from that time on the company has been using a plan which you might say is in compliance with the simplest construction you make of the Act.
100 In other words, the men got agreed stipulated pay for the first forty hours, and the time thereafter, with the exception of three classes of men, truck drivers, swabbers, and I believe the tandem truck drivers, these enormous trucks. The contract provides that they have base pay just like the others, but if their pay in any given month does not equal a certain stipulated sum, then the company may loan them the difference, and with the further provision that it is to be balanced out, taken out of future over-time, with an accounting had the first of each year, or when their employment ceases. Now that is a written contract signed by both parties, and the company is not bound to make a loan to them. Outside of that provision it is straight time of forty hours, and time and a half, except the pumpers. Of course there has been a problem in the oil industry how to handle the pumpers. That has been admitted by the administration. They have been as liberal as far as they could with the oil industry, and the contract which we made and are now operating under with these pumpers is based on our interpretation of the law as set out by the Fifth Circuit Court of Appeals in the Belo case. Of course that is before the Supreme Court of the United States now. From the interpretation of counsel for the defendant of that Belo case we made the contract along those lines in an effort to comply with the law.

Now it is our contention, of course, we don't think we violated the Act, but if we have violated it, it is in good faith, and the company was as careful as they knew
101 how to be in trying to comply with it right from its inception, and we have not acted in bad faith, and

they have done all that they could do, employed counsel and followed the advice of counsel. May be his advice is wrong, but at least I think we can clearly show they acted in good faith. Now then in July, but back further, before July—

The Court: What point do you make?

Mr. Monnet: I think that is an element in regard to the right to enjoin us from doing an act we are no longer doing. They are seeking to enjoin us from doing things we are no longer doing. Of course there are several instances they complain we are still violating the Act, in regard to the lease pumpers and the truck drivers. Now we changed these contracts in conformance with the agreement made between the drilling contractors of the Mid-Continent field and the Administrator back in July, 1941, I believe it was. We were one of the first companies, may be the first company to inaugurate the organization of the drilling contractors for the purpose of meeting with the Administrator, and after we met with him, that is us and the rest of the Association, because of the fact that the Administrator did not agree with our interpretation of the Act we voluntarily quit using the system we had been; and went to using the straight system; with the exception of the advance to those truck drivers, which I understand has been approved in one form or another where the Department considered it was a bona fide advance. Mr. Duke contends it is *fictitous* in our case. We contend it is not fictitious, and we are absolutely bound by the contract. The contract speaks for itself. If we over pay them they owe us, and if we under pay them we owe them. I believe that is all.

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The Court: Call your first witness.

Mr. Duke: Your Honor, may Mr. Street examine the witness?

The Court: Yes.

CLAUD BEATTY,

called as a witness on behalf of the plaintiff, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct Examination.

By Mr. Street:

Q. State your name to the court, please, sir?
A. Claud Beatty.
Q. Where do you live, please sir?
A. I live at Maud, Oklahoma.
Q. By whom are you employed?
A. Helmerich & Payne, Inc.
Q. How long have you been employed by Helmerich & Payne?
A. Almost eight years.
Q. In what capacity are you employed at the present time?
A. Lease pumper.
Q. How long have you been employed as a lease pumper?
A. Since the 6th of March, this year.
103 Q. Prior to the 6th of March in what capacity were you?
A. I was a helper on a truck.
Q. That termed swamper?
A. Yes, sir.
Q. What does that mean?
A. That is the oil field name for a helper is all I know.
Q. What are the duties of a swamper or helper on a truck?
A. He assists in loading; just general hauling, he does the outside work while the driver works inside the cab.
Q. What do you mean by the outside work, loading and unloading the truck?
A. Loading the trucks. Most trucks are equipped with winches, and the swamper works on the outside and assists in the loading while the driver works inside.
Q. Does the swamper do any relief driving?
A. Yes, sir.
Q. That is among his duties?
A. Well, it isn't compulsory, but they do.
Q. How long did you serve as a swamper or truck driver's helper?

A. Well, from about July of 1939 until the 7th of December, 1941.

Q. During the period of time when you were employed as a swamper did you work here in the State of Oklahoma?

A. In the *Dtate* of Oklahoma and adjoining States.

Q. Now just what did your duties require you to do: I mean, what did you haul and where did you haul it?

104 A. We hauled that oil field equipment, just general oil field equipment, pipe, cable machines, rigs, just all oil field equipment.

Q. Was that for Helmerick & Payne exclusively?

A. Yes, sir.

Q. Was the equipment that you hauled used in the drilling of wells, or for the production of oil after the wells were drilled, or both?

A. Both.

Q. For both purposes?

A. Yes, sir.

Q. I believe you mentioned that you hauled pipe among other things?

A. Yes, sir.

Q. And did you haul machinery of various kinds?

A. Yes, sir.

Q. Pipe and machinery both for the drilling of wells and for the production of oil?

Q. That is right.

Q. Was all of the hauling within the State of Oklahoma?

A. No, sir.

Q. Where else did you haul?

A. We hauled to Kansas, Texas, and made about three trips into Alabama.

Q. Now did you go outside the State of Oklahoma every week?

A. Well, no, sir, not necessarily. Just whenever a load or trip came up we took it out. There would be weeks we wouldn't go, and then go three or four loads in one week.

Q. What are the facts as to the *comparatice* num-

105 ber of weeks on which you did haul something to other States and those in which you did not?

A. Well, that would be hard to say off hand. We did more hauling in the State than we did out of the Stafe.

Q. In other words, I understand you to mean most of the

weeks you did not haul anything across any State lines, is that correct?

A. Yes, sir.

Q. Now while you were serving as a swamper what was the basis on which you were paid for your services?

A. Well, when I first went to work on the truck, I had been a roustabout, I worked awhile on the truck at roustabout pay, and then they paid me at $150.00 a month.

Q. Now when did that happen?

A. That was in 1939.

Q. Do you remember what part of 1939?

A. I am not positive, but I believe I went to work on the truck, started in July of 1939.

Q. And you were paid straight $150.00 a month?

A. Yes, sir, soon after I went to work on the truck.

Q. How long did that continue?

A. Well, until about September of 1941.

Q. About September of 1941?

A. I think it was about that time.

Q. Did you enter into one, sign one of these contracts signed by various employees?

106 A. Yes, sir, I have signed three of them.

Q. After you signed this, the first contract, back in 1939, did I understand that you continued to draw straight $150.00 a month?

A. Yes, sir.

Q. Now during that period of time did you or not work more than, during the year 1939 did you work more than, the latter part of the year 1939, more than 42 hours a week?

A. Well, as a general rule, yes.

Q. What were your regular hours?

A. Well, we had no regular hours.

Q. Well, what hours did you actually work?

A. I worked the hours the job we had on hand required to complete. That is any job that had to be done at that time, we went ahead and completed that job.

Q. Now as a general proposition did you work more than 42 hours per week at that time?

A. Well, yes, we worked more than 42 hours a week.

Q. About how many hours did you work?

A. It all depended on the job. There would be days when we had a short job and not work over four or five

hours, and then another day a long haul, we would drive ten or twelve or may be fourteen hours.

Q. Well, what would you say as a regular thing the average number of hours per week you worked?

A. Well, I couldn't say, because it varies *do.* I don't know as I could average the hours.

107 Q. Would you give us some kind of an estimate about it?

The Court: He says he cannot.

Q. Of course you made records, did you, of the hours you worked, turned in a time report?

A. Yes, sir, there is a record of it. I don't have the record but the boy I worked with has a truck report that he has kept of the hours we put in on the truck.

Q. Now coming down to the time you went to work as a pumper, which I believe you stated was in March, 1942?

A. Yes, sir.

Q. What lease do you work on?

A. I work on School Land-Saban, south of Moore.

Q. What are your duties as a pumper?

A. Just maintenance of the lease, keeping it up, and the running of the wells, and trying to get production.

Q. You mean you pump the oil out of the wells?

A. Out of the wells.

Q. How many hours per day do you work?

A. Well, it varies too. I never work less than nine hours a day, and from nine on up.

Q. Is that true up to the present time?

A. Yes, sir.

Q. And how many days per week do you work?

A. Seven days per week.

Q. When you went to work as a pumper, did you sign a new kind of contract?

108 A. Yes, sir, I signed one.

Q. And what is your compensation under that contract?

A. Well, I signed a contract for $33.16 a week, less house rent.

Q. And you drew that, is that the amount that you actually drew each week?

A. Well, considering the house rent, yes, sir.

Q. The house rent is deducted?

A. Yes, sir.

Q. How much is the house rent?

A. It is $8.00 a month.

Q. As I understand you then your wages remained the same each week regardless of the hours that you worked?

A. Yes, sir.

Q. Do you recall the provisions of that contract you entered into, Mr. Beatty?

A. Well, only partially. I couldn't interpret it myself.

Q. Was that the contract that had the "X's" in it?

A. It was a little deep for me, as far as interpreting the contract. As far as my knowledge of what the contract consisted of I am not capable of reading it and determining what it meant. I couldn't do it.

Q. Did you understand you were to be paid the same amount each week?

A. Yes sir, and according to the way I understood it, according to the base pay and all, I couldn't or haven't worked enough hours to make the pay I received; that is under the base pay.

109 Q. You haven't worked enough hours?

A. No, it calls for about, as near as I can figure, whether it is correct or not, but the way I figure it a little in excess of twelve hours a day, and I won't average that many hours.

Q. But you are still being paid at the same rate?

A. Yes, sir.

Mr. Street: That is all.

Cross Examination.

By Mr. Monnet:

Q. You read the contract before you signed it?

A. Yes, sir, I read it.

Q. It is a little hard for you to understand that "X" business, wasn't it?

A. Yes, sir.

The Court: You are not the only one that is having trouble with that "X" business.

Q. But you did understand this pay you were getting was to include your regular time and time and a half together?

A. Yes, sir.

Q. As long as that exceeded thirty cents an hour minimum, you understand that?

A. Yes, sir.

Mr. Monnet: That is all.

Re-direct Examination.

110 By Mr. Street:

Q. Do you turn in hours worked each week as pumper?

A. I turn in eight hours a day.

Q. Each day?

A. Yes, sir.

Q. How does it happen you turn it in that way?

A. Well, I don't work enough hours to make up the difference in my pay, so I turn in eight hours a day, and it is the same anyway. Unless I average more than twelve hours a day I won't draw the pay that I receive, that is according to the base pay and over-time pay, I won't make the money that is paid.

Mr. Street: That is all.

The Court: You turn in the record showing you work eight hours each day regardless of the number of hours you work?

A. That is right.

The Court: Have you been instructed to set out accurately the number of hours you actually work each day?

A. No.

The Court: Have you been given any instructions about that at all?

A. Well, not that I recall, no sir. They made out a form and delivered us, and told me I was to work eight hours a day, then they made us a form out.

The Court: Told you that you were to work eight hours?

A. Yes, sir.

111 The Court: Was that regardless of the number of hours that might be necessary for the particular job on this lease?

A. Well, they never said. I supposed I am responsible for the job.

The Court: You were there to do a certain job, and you do it?

A. Yes, sir.

The Court: You understood you were expected to do that job in eight hours?

A. Yes, sir.

The Court: So you just turned in eight hours each day?

A. Yes, sir, I turned in eight hours.

The Court: Anything further?

Mr. Monnet: Yes, sir.

Re-cross Examination.

By Mr. Monnet:

Q. You say you were instructed just to work eight hours a day?

A. Well, yes, I guess that I was, because that was the time I was to turn in.

Q. Now has anybody told you to just report eight hours a day?

A. Not that I recall, no, only on the form I was given, and I think they were sent out of the office on the day to file your time; it was that way and we followed the form.

Q. The form you were given to report on, you had to fill in the number of hours each day?

A. Yes, sir, there is a place for the hours.

412 Q. If you worked five hours, or ten, or twelve, it didn't make any difference up to twelve hours a day, your pay would be the same?

A. It would be the same, yes sir.

Q. It wouldn't make any difference whether you worked five hours a day or ten or twelve?

A. No, that wouldn't make any difference.

Q. And your explanation of putting in the eight, your hours varied so you put down eight?

A. I put down eight.

Q. But no one has ever told you?

A. Not that I have been told to write it up as eight.

Q. Not to show an inaccurate statement of the hours?

A. No, sir.

Mr. Monnet: That is all.

HAROLD D. GRIFFIN,

called as a witness on behalf of the plaintiff, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct Examination.

By Mr. Duke:

Q. State your name to the court, please?

A. Harold D. Griffin.

Q. Mr. Griffin, you are employed by Helmerich & Payne, Inc.; are you not?

113 A. Yes, sir.

Q. Are you an officer of the corporation?

A. Yes, sir.

Q. What position to you hold?

A. Title, Vice President and Secretary.

Q. How long have you been so employed?

A. Since March 6, 1935.

Q. You are familiar then, are you not, with the wage practices that were instituted by Helmerich & Payne, Inc., the defendant here, beginning in October, 1938?

A. I have gone into it thoroughly on different occasions, although I don't work on it directly.

Q. Are you a member of the Executive Committee of the corporation?

A. I would say so, yes.

Q. Calling your attention for the moment to the contract entered into between the company and its employees in September, in July, 1941, and which has been marked Exhibit "E" in the stipulation that has been filed in this case, will you look at that, please sir. Do you see the provision in that contract where the payment of a guarantee wage to truck drivers, swampers, and tandem truck drivers?

A. No, I don't see the terms as a guarantee.

Q. Are you looking at paragraph 2?

A. Yes.

Q. Where it is provided in the event the hours worked on the plan does not equal a certain amount they will be advanced the difference to make up to the agreed

114 amount?

A. That is right.

Q. Have you ever required the repayment of any advance to any of those employees?

A. No, it has never been required.

Q. The same provision with reference to any of the classes of employees where that provision occurred in any of the contracts you have entered into, have you ever required the repayment of such advance or loans?

A. No, we have not. We got into some difficulty on that.

Q. Mr. Griffin, this contract, it has been stipulated here that it was entered into on July 16, 1941, the latest contract, is that date correct? The exhibit I show you bears the date of September, 1941, does it not?

A. State the question again, please.

Q. That agreement, the one I show you, bears the date of September, 1941, does it not?

A. That is right.

Q. Was it really entered into then or made retroactive to July 16, 1941?

A. The contract was effective July 16, 1941, and was a printed form, and then was signed up by the employees as of the date of their subsequent employment, or that they signed it. It was retroactive to July 16, 1941, I believe. Now I am not positive about that.

Q. I understand you then that some of these contracts at any rate were actually signed subsequent to July

115 16th?

A. Certainly.

Q. Was any payment of money made to any of these employees between the time this contract went into effect and back to July 16, 1941?

A. That question is not quite clear.

Q. Well, did you do this: It seems apparent here from your testimony that some of these contracts at any rate were not signed up by the employees until after July 16, 1941. Did you pay those men upon signing these contracts, did you pay them any difference in wages due them for

the period between July 16, 1941, and the date they signed the contract?

A. My recollection is that they were being paid under the terms of that contract from July 16, 1941, regardless of when they signed the contract. That is my recollection.

Q. Hadn't they in the meantime, hadn't you continued to pay them for some period of time after July 16th under the old contract, and then when they signed this you made up the difference back to July 16th, isn't that true?

A. That is right, yes.

Q. Were there many of them effected?

A. Yes, quite a few, quite a few.

Q. Do you recall the total amount that you paid back?

A. No, I don't recall off hand.

Q. Could you estimate it?

A. No, I couldn't. I would have to go to the records for that.

116 Q. Now I show you what has been marked for identification Plaintiff's Exhibit No. 1, and I will ask you to read that, please sir?

A. I believe I have it.

Q. This is a copy of a letter addressed to G. C. Street, Regional Director of the Wage and Hour Division, Dallas, signed by Settle, *Monett* & Clammer, by Eugene O. Monnet. Is Mr. Monnet an officer of Helmerich & Payne?

A. No, he isn't an officer of Helmerich & Payne. He is attorney for the company.

Q. Is he a member of the Board of Directors of that company? Does he have any official connection with the company?

A. No, not with Helmerich & Payne.

Mr. Duke: I offer the copy as Plaintiff's Exhibit No. 1.

Mr. Monnet: We have no objection.

Q. Admittedly then, you say you knew of this letter, you have seen it before this time?

A. I believe so, yes; it looks familiar.

Q. Does that express your conception of the purposes of the defendant in arriving at these various plans?

A. Yes, sir.

Q. Now a moment ago when we were speaking of the retroactive effect of those last contracts when you stated

that you paid certain amounts of money wherever due from July 16th up to the time when the practice was put into effect, did that apply also to drillers, as well as other classes of employees?

A. I am positive that that applied to all classes of labor.

Mr. Duke: That is all.

Cross Examination.

117 By Mr. Monnet:

Q. This contract that Mr. Duke spoke to you about, Exhibit "E", you will recall had this provision at the time: "It is understood that this agreement shall be effective as to present employees executing the same as of and from July 16, 1941." You recall that provision?

A. Yes, sir, I recall it.

Q. Now then practically all of those contracts, I expect all of them, were signed after July 16, 1944, were they not?

A. Yes, sir.

Q. As a matter of fact they had to be reprinted and were not ready to sign until after July 16th?

A. That is right.

Q. But they were to be effective as of that date on account of the agreement made with the Administrator of the Wage and Hour Division?

A. Yes, sir.

Q. And as to all your old employees that signed that contract, your office spent several months in going back in the spare time and checking up the pay they received under the old contract, and bring it up and giving them an additional amount they were entitled to under this new contract?

A. Yes, sir, considerable amount of work.

Q. As a matter of fact it took you several months to go back and check that up and send them additional amounts?

A. Yes, sir.

118 Q. So far as you know every one entitled to the difference were checked up, the amounts figured, and they were paid that money, is that right?

A. Yes, sir.

Q. Now Mr. Griffin, you are a director of Helmerich & Payne, the *Delaware* corporation, that is the present operating corporation?

A. Yes, sir.

Q. And you are also a member of the Board of Directors of Helmerich & Payne, the Oklahoma corporation, which was merged into the *Delaware* corporation in 1940?

A. Yes, sir.

Q. And you were a director of the old company when this law went into effect?

A. Yes, sir.

Q. Did you ever attend any meeting of the Board of Directors discussing the plans about following the provisions of this law before it became effective?

A. I am sure I attended every one of them. I attended a considerable number.

Q. Besides having the official position you have, you are the Chief Auditor of the company, are you not?

A. Yes, sir.

Q. And have been since you have been connected with it?

A. Yes, sir.

Q. Now were these various plans for complying
119 with the wage and hour law promulgated by Helmerich & Payne since October, 1938, were they worked out with the advice of counsel, and after a great deal of conferring among the directors?

A. Considerable amount of thought given to the preparation of those contracts, and they were in accordance with the advice of counsel.

Q. And did the Board of Directors have advice of their counsel that in his opinion they complied with the wage and hour law?

A. Yes, sir, and they were studied by all of the directors of the company.

Mr. Monnet: That is all.

Re-direct Examination.

By Mr. Duke:

Q. Now Mr. Griffin, as Mr. Monnet brought out, there was considerable time necessary following July 16, 1941, when the new contracts were entered into, there was considerable time taken up with preparation of the figures that you made for computing amounts due the employees under the new contracts, to make up the difference, that is correct, isn't it?

A. Yes, sir.

Q. Now as a matter of fact no additional amounts were paid any employee except drilling employees were paid? No pumpers were paid any additional amounts, no production employees out on the leases?

120 A. The employees covered by the new contract, their pay was recalculated and they were paid additional amounts.

Q. Aren't you *speak* through only of the drilling employees? I will put it this way: Were the pumpers on the leases paid anything additional at any time?

A. I would say no. I would have to check that, but I would say no.

Mr. Duke: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Duke: I think that is sufficient with what is in the stipulation, Your Honor. The plaintiff rests.

W. H. HELMERICH,

called as a witness on behalf of the defendant, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct Examination.

By Mr. Monnet:

Q. State your name, please?
A. W. H. Helmerich.
Q. Where do you live?
A. Tulsa, Oklahoma.
Q. Are you connected with Helmerich & Payne?
A. I am.
Q. Defendant in this action?
121 A. Yes, sir.
Q. What is your position with the company?
A. I am President.
Q. You also were President of Helmerich & Payne, the Oklahoma corporation, which was merged into the present *Delaware* corporation in February, 1940?
A. I was.

Q. In fact you have been President of both companies since their inception?

A. Yes, sir.

Q. And of course a member of the Board of Directors?

A. Yes, sir.

Q. Mr. Helmerich, do you recall back in September and August, 1938, whether the Board of Directors of Helmerich & Payne ever discussed the question of interpreting the meaning of the wage and hour law, and working out a plan for paying wages in conformity with the law?

A. We spent many hours on it.

Q. Do you remember the effective date of the Act?

A. No, I don't remember the effective date of the Act, but I remember this, that we had discussions some two to three months prior to it, because whatever we decided to do we wanted to do it prior to the day that the Act went into effect.

Q. Now then did you employ counsel to advise you with regard to the interpretation of the Act?

A. Yes, sir.

Q. And did you form a plan by which you set out
122 a wage scale to, as you thought, conform with the Act?

A. We did. We worked a plan that we were confident complied with the Act.

Q. And was that plan suggested or recommended by your counsel as being in compliance with the Act in his opinion?

A. Well, it was practically his plan.

Q. Now then you, of course, are familiar with the various wage plans the company has *inaugerated* since the wage and hour Act went into effect?

A. Yes, sir.

Q. Were all those various plans made with the approval and upon the recommendation of your counsel as being in compliance with the Act?

A. That is right. What we attempted to do was to give our counsel our problem and have him work out a contract that would comply with the Act, and when that was done we accepted it.

Mr. Monnet: That is all.

Cross Examination.

By Mr. Duke:

Q. Mr. Helmerich, it is true, isn't it, that when this plan was worked out and put into effect, it resulted in no change whatever in the employment conditions of your employees, either as to wages received or hours worked? That is true, isn't it?

123 A. Let me put it this way. It kept us from making a wage cut that were necessary for us to make if we hadn't adopted this plan.

Q. Wasn't your purpose to accomplish just what I have said, that you would make no changes, keep the same men?

A. Our attitude was this; we would continue on with our present wage scale for the two or three intervening months, rather than to cut them, and then put them back when this law went into effect. We were faced with the condition we couldn't continue on the rate of pay, especially in Illinois, rather than cut them and bill them back when this law went into effect when our competitors would also have to meet it.

Q. Yours is a competitive business, is it not Mr. Helmerich?

A. Yes, sir, it is.

Q. And there were established wage rates in the industry, were they not?

A. No set rates. They varied as much as 15 to 20 per cent.

Q. In the same field?

A. In the same field, yes, sir.

Q. You say then that your purpose in adopting this plan was to keep from reducing the hours of labor of the employees?

A. No, I don't think so. I say the purpose of not decreasing the wages some three or four months prior to the time this went into effect.

Q. You did decrease the hourly wage, didn't you?

A. When?

Q. Well, if you took a man—

The Court: That is argumentative.

124 A. If this law had not been going into effect when it was, I think it was in the fall of the year, we would

have lowered the wage scale in the summer of that same year.

Q. If it hadn't gone into effect?

A. If we hadn't anticipated it going into effect in the fall, and rather than make two changes we decided to go on with our wage scale until this law went into effect.

Q. In any event it is generally true, is it not, if conditions remained as they had been, the men continued to work approximately the same hours and received the same pay?

A. Yes, sir, that is right.

Mr. Duke: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Monnet: We rest.

The Court: I will tell you what I think you had better do in this case. It occurs to me that the Belo case now before the Supreme Court will be controlling as to whether the defendant company has violated this Act. The plan adopted by the defendant company, the contracts entered into with its employees, is essentially the same as the plan used by the Belo Company. Of course this first contract presents a little different situation, but I think the net result is the same. So I don't think this case should be decided until the Supreme Court passes on that case. You say it has been argued. Certainly the opinion in
125 that case should point the way. I believe I will ask you to submit a memorandum brief in this case after the Belo case comes down, Mr. Duke.

Mr. Duke: Yes, sir.

The Court: Serve it on Mr. Monnet, and then he can file a response, and then I will set the case for decision, and if necessary hear arguments at that time. Very likely won't be necessary to hear them. Do you think that is the way to handle it?

Mr. Duke: Yes, sir, I think that is all right.

Mr. Monnet: We have been discussing that, and we don't know what the Supreme Court will hold in this Belo case.

Plaintiff's Exhibit No. 1.

August 15, 1940

Re: Helmerich & Payne, Inc.—Drilling Contractors, 415 Philtower, Tulsa, Oklahoma.

Honorable G. C. Street, Regional Director of the Wage and Hour Division, Department of Labor, Dallas, Texas.

Attention: Mr. J. F. Crow

126 Dear Sir: About two weeks before the Fair Labor Standards Act went into effect, the above named company put into effect a wage scale as shown by the enclosed form. Mr. Crow has asked us to write you explaining how this scale was worked out.

As you perhaps already know, the drilling contracting business pays quite high wages and employee's pay is based upon what is called an 8 hour tour or period of work. Drilling tools must be worked 24 hours a day and each day is divided into three tours of 8 hours each and the men are normally employed to work one tour of each day. The following is a brief schedule of wages paid per 8 hour tour to the following classes of employees in this business:

Rotary Drillers	$11.00
Rotary Helpers or roughnecks	7.00
Cable Drillers	10.00
Tool Dressers	8.00
Roustabouts (in Texas and Kans.)	4.80
" " Okla. and Ill.)	5.00
Water pumpers	4.50

127 You can readily see that the wages paid to the employees of this company were proportionately so far in excess of the minimum required by the Fair Labor Standards Act that the company's problem in complying with the Act was not the amount of its wage scale but more the method in which the wage scale was determined. Before the act went into effect, wages were paid more upon the basis of a day's work done than upon actual hourly labor performed, it being the custom of this business that, when a driller commenced work on an 8 hour tour, he was considered for payroll purposes to have worked 8 hours whether he actually did so or not, although in most in-

stances a full 8 hours work was performed. Under the provisions of the new act, it became necessary to base our wages upon an hourly basis.

The conditions surrounding the drilling contracting business were such that it would have been impractical to have divided a working day into four 6 hour tours instead of three 8 hour shifts or tours. Furthermore, competent and experienced drillers and driller's helpers could not be employed on the basis of a 6 hour day and they wouldn't take the cut in pay which would be necessitated by shortening their daily hours of work. It, therefore, became necessary to work out an hourly wage scale which would, for instance, pay a rotary driller for 8 hours work the total sum of, $11. This was done by entering into employment agreements with our men by which the first 4 hours of each 8 hour tour would be paid for at the regular hourly rate and the next 4 at time and a half. This was determined by using the algebraic formula 40 x equals the daily wage, X being the regular
128 hourly rate; consequently, a driller who would work 8 hours for $11 would work at a regular hourly rate of $1.10; his first 4 hours in each 8 hour tour pays him $4.40 and his next 4 hours at time and a half would pay $6.60, or a total of $11. In this manner the regular hourly rate of the men connected with the drilling contracting business was determined, they were so notified, agreed to that basis of payment and have since that date been paid at that rate.

This schedule was worked out about two weeks before the law went into effect. It was passed upon and approved by the executive board of the company. Roustabouts were to be paid a regular hourly rate of 48c and the schedule was delivered to the auditing department with instructions to comply therewith. Notice was sent to all of the foremen in the field with instructions to notify the men of the change in wage scale. Also, a rubber stamp was made, an imprint of which is herein attached, which was stamped upon the backs of the wage checks over the place for the employees endorsement thereon. However, roustabouts in Oklahoma and Illinois were being paid $5.00 per day or 8 hour tour, which made their regular hourly wage rate 50c per hour. Due to the fact that roustabouts in Texas and Kansas received only $4.80 per day for an 8 hour day or tour, or a

regular rate of 48c per hour, the wage scale of the roustabouts in Oklahoma and Illinois, which was 50c per hour, amounting to $5 per day, was not put on the rubber stamp as it might have caused dissatisfaction among this class of employees. It was very rarely that a roustabout would work more than an 8 hour tour and, consequently,
129 the bookkeeping department in making the wage checks fell into the erroneous habit of figuring the checks on the basis of $5.00 for an 8 hour day, without taking into consideration the manner in which this wage should be computed; consequently, in a few instances where roustabouts in Oklahoma and Illinois did work 10 hours instead of eight the men in the auditing department making up the payrolls, in several instances, paid these men on a basis of 62½c per hour rather than the agreed and authorized regular wage scale. Under the regular wage schedule, a roustabout would receive $6.00 for 10 hours work, but under the way it was so erroneously figured a few times by the auditing department, they were paid $6.25. In going over the books of the company, your Mr. Crow noted this discrepancy in several instances and asked for an explanation thereof, which is above stated.

If there is any further information you desire from us in regard to determining and paying the wages of our employees, we will attempt to promptly answer the same.

Yours very truly,

SETTLE, MONNET & CLAMMER,
By EUGENE O. MONNET.

EOM:K

United States of America, Northern District of Oklahoma, ss.

130 I, Geo. H. Lessley, do hereby certify that I am the Official Court Reporter for the United States District Court for the Northern District of Oklahoma, and as such Court Reporter I made a full, true and correct stenographic report of the proceedings had on the hearing of the above entitled and numbered cause, L. Metcalf, Administrator of the Wage and Hour Division U. S. Department of Labor, Plaintiff, vs. Helmerich & Payne, Inc., a corporation, Defendant, No. 568 Civil on the dockets of said court, and that the above and foregoing pages numbered 1 to 37, both,

inclusive, is a full, true and correct transcript of said proceedings.

Dated at Tulsa, Oklahoma, February 9, 1943.

GEO H. LESSLEY, Court Reporter.

Filed: February 13, 1943. H. P. Warfield, Clerk, U. S. District Court.

[Clerk's Certificate.]

United States of America, Northern District of Oklahoma, ss.

149 I, H. P. Warfield, Clerk of the United States District Court for the Northern District of Oklahoma, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, vs. Helmerich & *Payne*, Inc., Defendant, Civil Action No. 568, as designated by counsel and as required under Paragraph G of the Rules of Civil Procedure to be prepared and certified as the same appears from the records in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Tulsa, this 24th day of February, A. D. 1943.

H. P. WARFIELD, Clerk.

(Seal) By M. M. EWING, Deputy Clerk.

Filed February 26, 1943. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of submission

Second day, September Term, Wednesday, September 8th A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, George B. Searls, Esquire, and Morton Liftin, Esquire, appearing for appellant, Eugene O. Monnet, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion

[November 15, 1943]

George B. Searls and Morton Liftin (Irving J. Levy, Acting Solicitor, Bessie Margolin, Assistant Solicitor, and Llewellyn B. Duke, Regional Attorney, were with them on the brief) for Appellant.

Eugene O. Monnet (Frank Settle and Sam Clammer were with him on the brief) for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges.

BRATTON, Circuit Judge:

The Administrator of the Wage and Hour Division of the Department of Labor instituted this action against Helmerich & Payne, Inc., to enjoin alleged violations of the Fair Labor Standards Act, 52 Stat. 1060. The company is engaged in the business of drilling oil and gas wells, some for itself and some for others, and in the production of oil and gas; and in the furtherance of its activities, it had during the times in question an average of approximately 400 employees, of whom about 305 were engaged in drilling operations, about 70 in the operation of leases, and about 25 in clerical positions. The court granted the injunction in part as sought, but denied it in respect to employment under and in accordance with three types of contracts being used; and the Administrator appealed.

One type of these contracts is referred to as the split-day plan. It provides for fixed regular hourly rates of pay for the several classifications, all in excess of the minimum contained in the act; provides that the regular rate per hour of employees within certain classifications shall be paid for the first four hours in an eight-hour

tour, and that hours worked in excess of the first four shall be paid for at one and one-half times the regular rate; provides that employees in another classification shall be paid the regular rate for the first five hours in each ten-hour tour, and that the hours worked in excess of the first five shall be paid for at one and one-half times the regular rate; provides that the employees in other classifications shall be paid the regular rate per hour for the first five hours in a twelve-hour tour, and that hours worked in excess of five shall be paid for at one and one-half times the regular rate; provides that the regular rate shall never apply to more than forty hours in any workweek—that being the maximum provided in the act at the time of the execution of the contracts; and provides that in the event the monthly compensation of employees coming within certain groups shall not equal certain respective sums, the company will advance the difference which shall apply on future overtime payments, and that adjustments shall be made on January first of each year, and when the employment ceases. The second type of the contracts in question is called the advance-plan contract. It likewise provides for fixed regular rates for the several classifications, all in excess of the minimum fixed by the statute; provides that such regular rates shall be paid for the first forty hours worked in any week, and that the hours worked in excess of forty shall be paid for at one and one-half times the regular rate; and provides that in the event compensation of employees within certain classifications shall not equal certain specified sums, the company may advance and loan the difference, which shall apply on future overtime payments, adjustments and accounting to be made on January first, or when the employment ceases. No advances or loans were ever made under either of the two types of contract.

Both types of contracts are attacked on the ground that they are not actual, bona fide agreements of employment, entered into in good faith, with regular and overtime rates of pay, within the meaning of the act; but provide fictitious and unreal rates used solely for the purpose of compensating the employees in the same amounts as they were paid before the act went into effect. The company concedes that the real purpose in entering into the contracts was to continue paying the employees the same amounts per week in the aggregate as they had been paid before the act became effective, and at the same time to comply with the act. Of course, a contract which capriciously provides for fictitious and unreal rates bearing no relation to the wages paid does not comply with the act. But a contract understandingly entered into in good

faith, providing in a bona fide sense for regular and overtime rates per hour which conform to the provisions of the act, is effective, even though one of the intents and purposes is to continue to compensate the employee in the same amount per week in the aggregate as he had received before the act went into effect (Walling v. A. H. Belo Corp., 316 U. S. 624). These contracts were actually entered into; there is no suggestion that the parties failed to understand them; there is no showing that the employees were overreached; and there is nothing in the record to indicate that any other element of fraud attended their execution. They expressly provide in clear and explicit language for regular rates per hour which exceed the minimum rates provided in the act, provide that such rates shall be paid for regular hours which do not exceed the maximum provided in the act, and provide for overtime at one and one-half times the regular rates for all excess time worked. The company and its employees mutually entered into the respective arrangements, and they do not contravene the exactions of the act (Walling v. A. H. Belo Corp., supra).

Emphasis is placed upon the provision in one type of the contracts for advances to certain employees and the provision in the other type for loans to certain employees. But, as already said, each type provides for regular pay and overtime pay in amounts which meet the requirements of the act. Having done that, in provision in one for advances and in the other for loans over and above such pay does not render the contracts objectionable, within the purview of the act (Walling v. A. H. Belo Corp., supra).

The third type of contract challenged is referred to as the X formula contract. Exhibit I in the record is typical. It provides for a specified sum per week, payable bi-weekly; provides that the pay shall not be less than thirty cents per hour for the first forty hours and forty-five cents per hour thereafter in each week; provides that the pay received shall cover and include regular time and overtime; provides that the regular hourly rate per each week shall be determined by the following formula, "Let X equal my regular or base hourly wage for each workweek. X shall then be determined by multiplying X by the number of hours in each week which I work up to the first 40 and adding to it the number of hours worked in said workweek in excess of said 40 hours times 3X 2, which shall equal the compensation I receive for that week"; and provides that in the event the weekly regular hourly wage, determined in accord-

ance with the formula, shall in any week equal less than thirty cents per hour, thirty cents per hour shall be the regular hourly wage for the first forty hours worked in that week, and forty-five cents per hour shall be the overtime wage for the additional hours worked. In Overnight Motor Co. v. Missel, 316 U. S. 572, the employee received a fixed weekly salary before the act became effective and a slightly larger salary thereafter. Nothing above the weekly wage was paid, because the maximum workweeks, computed at the statutory minimum rates with time and a half for overtime would not require any sum above the weekly wage. In other words, the wage paid was sufficient in amount to cover the statutory minimum base pay for the statutory maximum regular hours and fifty percent additional for the additional hours actualy worked. But there was no contractual limit upon the hours which the employer could have required the employee to work for the agreed wage. Neither was there any provision for additional pay in the event the hours worked required minimum compensation in excess of the fixed wage. The court said that the contract was deficient in complying with the law. Here, this type of contract does not fix in terms of dollars and cents any regular rate or overtime rate of wage. Until the work has been done and the end of the week arrives, neither the employer nor the employee knows the regular or overtime rate. Until then both parties are in the dark as to such rates. And then the regular rate is automatically determined by application of the formula, so that the regular rate for the first forty hours and one and one-half times that rate for the overtime shall equal the stipulated weekly wage. The formula serves only as a means of arriving at a figure for the regular rate which, together with the overtime rate, represents the weekly wage. And in practical reality there is no contractual limit on the hours the company may require an employee to work for that amount, if it sees fit to do so. Subject only to the exception that the employee must receive not less than thirty cents per hour for the first forty hours in each workweek and forty-five cents per hour thereafter for overtime, he receives the same wage regardless of the number of hours he is required to work. The only difference is that by application of the formula, as the number of hours increases the regular rate per hour is decreased. But in the end, the employee receives in lump sum the weekly wage. While the contract does provide for a regular wage of not less than thirty cents per hour and overtime of not less than forty-five cents per hour, that provision has no practical operative effect

whatever because in order to earn more than the stipulated weekly wage the employee would be obliged to work unreasonably long hours—far in excess of the hours which the parties could reasonably have contemplated. A contract of this kind fails to meet the requirements of the act (Overnight Motor Co. v. Missel, supra).

The judgment is modified by including within its injunctive provisions a provision restraining the company from the further production of goods for commerce through the use of employees under contracts of which Exhibit I is typical, and as modified it is affirmed.

Judgment

Thirtieth Day, September Term, Monday, November 15th A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby modified by including within its injunctive provisions a provision restraining the company from the further production of goods for commerce through the use of employees under contracts of which Exhibit I is typical, and as so modified, be and the same is hereby affirmed.

On December 21, 1943, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the Northern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit

Court of Appeals, No. 2704, wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, was appellant, and Helmerich & Payne, Inc., was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 5th day of February A. D. 1944.

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

[SEAL]

By GEORGE A. PEASE,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE 1944

Supreme Court of the United States

Order allowing certiorari

Filed March 27, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, limited to the first question presented by the petition and the case is transferred to the summary docket. Counsel are requested to discuss in their briefs and on oral argument the question whether the case is moot.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FEB 14 1944
CHARLES ELMORE CROPLEY
CLERK

No. [redacted]27.

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

HELMERICH & PAYNE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above case on November 15, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the district court appear at R. 73–85. The district court did not deliver an opinion. The opinion of the circuit court of appeals (R. 115–119) is reported at 138 F. (2d) 705.

JURISDICTION

The judgment of the circuit court of appeals was entered November 15, 1943 (R. 119). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Prior to the effective date of the Fair Labor Standards Act respondent paid certain employees a regular wage for each eight hour shift, called a tour, regardless of the number of hours worked in the week. In order to avoid paying higher rates for overtime under the Act, respondent caused these employees to execute agreements reciting that it would pay them a stated "regular rate per hour" for the first four hours of each eight hour tour, and one and one-half times that rate for the next four hours. The regular rate recited in the agreement was worked back from the previous tour rate according to a formula designed to ensure that the total tour wage would continue to be the same as before. For example, drillers' helpers who had received $7 a tour were to be paid, according to the recitals of the contract, $0.70 an hour for the first four hours, or $2.80, and $1.05 an hour for the next four hours, or $4.20, making a total of $7. In fact, however, respondent continued to keep its records on a tour basis and to pay the tour wage even though less than eight hours were worked.

Section 7 of the Act requires that an employee employed in excess of forty hours in any week shall be compensated at a rate "not less than one and one-half times the regular rate at which he is employed." When respondent's employees worked a sixth, seventh or eighth tour (*i. e.*, 48, 56, or 64 hours), they were paid the tour rate as before. The question presented, therefore, is whether the employees who received the same tour rate for tours worked in excess of the statutory maximum as for the first five tours were being paid one and one-half times their "regular rate" of pay. This depends on whether the rate for the first four hours of each tour, designated in their contracts as the "regular rate", is the "regular rate" for the purposes of Section 7 notwithstanding that it was never the actual basis of the employees' compensation.

2. Respondent caused a number of its employees to enter into agreements setting forth a so-called "base or regular rate per hour" for the first forty hours and promising to pay one and one-half times that rate for overtime hours; in addition, respondent stated in the agreement that if the earnings of an employee at the above rates were less than a stated biweekly salary, it "may advance and loan said employee the difference, which shall apply on future overtime payments; adjustments and accounting to be made on the first day of each year * * * or when said employment ceases" (R. 77–79). This was the contract. In fact, respond-

ent continued to pay the biweekly salary, kept no record of its employees' earnings at the hourly rates, did not pay overtime due in excess of the biweekly salary even though earned, and never collected the so-called "advances."

The question presented is whether this method of payment complied with Section 7 because the contract recital fixed the "regular rate" of pay, or whether, as in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, the "regular" hourly rate should be determined by dividing the number of hours into the weekly salary.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date.
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This case arises on a complaint filed in the district court by petitioner, the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act to restrain violations of the Act (R. 4–9). Respondent is engaged in the production of oil and gas for interstate commerce (R. 73) and its employees admittedly are covered by the Act (R. 82, 89). The issues raised at the trial and in the circuit court of appeals related principally to the validity of respondent's methods of payment for work in excess of the maximum number of hours permitted by Section 7 of the Act.[1] Two methods of payment whose validity the Administrator challenged but which were approved by the district court and circuit court of appeals may be summarized as follows:[2]

The Poxon or split-day plan.[3]—Prior to the

[1] During the first year after the effective day of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[2] Respondent used altogether five different plans for compensating its employees. Of these, an hourly wage plan which followed literally the scheme of Section 7 was held valid, and a straight salary plan was held invalid by the district court on the authority of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. No appeal was taken from these rulings. A third plan, the "X plan," which the circuit court of appeals held invalid, is described in n. 12, *infra*, p. 20.

[3] The methods of payments involved in this case are common throughout the country, having been publicized by trade journals, and have come to be known by various names, sometimes, as in the case of the "Poxon" plan discussed below,

effective date of the Act certain classifications of respondent's employees had worked eight hour shifts, called "tours" and were paid a wage for each tour—$7 to helpers, for example. As a result of the Act they were caused to work under new contracts of employment incorporating the so-called "Poxon" plan of payment.[1] The contracts recited that each tour was divided into two parts, four hours of "regular" time, to be paid for at an

by the names of the men who devised them as means of avoiding the effect of the overtime provisions of the Act.

The straight "Poxon" plan (described pp. 6-9) applied to drilling employees such as drillers, helpers, roustabouts, and so on—from November 1, 1938, up to approximately July 16, 1941 (R. 74, 75, 75–77). The "advance" plan (discussed *infra*, pp. 9–11), first adopted about October 1, 1940 (R. 75–77), applied to lease pumpers, truck-drivers, and their helpers (swampers). Before that date these classes of employees received fixed monthly salaries regardless of hours (R. 75). In July of 1941 respondent adopted a modified version of the "advance" plan (discussed pp. 10–12) for the truck-drivers and their helpers (R. 24–25, 37–38, 77–79), while the lease pumpers were taken out from under the "advance" plan and put under the "X plan." (See p. 20, n. 12.)

[1] A letter in the record (R. 112) from the respondent's attorney states: "This schedule was worked out about two weeks before the law went into effect. It was passed upon and approved by the executive board of the company * * *. Notice was sent to all of the foremen in the field with instructions to notify the men of the change in wage scale. Also, a rubber stamp was made, an imprint of which is herein attached, which was stamped upon the backs of the wage checks over the place for the employee's endorsement thereon." Thus, an employee could not cash his pay check without signifying his acceptance of the plan.

hourly rate called the "regular rate," and four hours of overtime, to be paid for at one and one-half times the regular rate.[1] (R. 74, 75, 75–77.) Admittedly, the so-called "regular" and "overtime" hourly rates had been calculated by applying a mathematical formula to the previous tour rates in order to determine what hourly rates would yield the employees the same tour wage as before (R. 112). For example, the "regular rate" assigned to helpers, who had formerly been paid $7 per tour, was fixed at $0.70 and the "overtime" rate at $1.05 so as to yield them the same $7. The purpose of these contracts was to circumvent Section 7 of the Act by avoiding the payment of higher rates for the hours worked in excess of forty without reducing the wages paid for regular working hours. (R. 74, 75–77, 109–110, 111–112.) Thus, a helper received $7 a tour throughout the week, $42 for a six tour 48-hour week, $49 for a seven tour 56-hour week, etc., exactly the same pay as before the Act, and exactly the same pay for hours in excess of forty as for the first forty hours.

The evidence shows that the contract hourly rates were never used for any practical purpose. No employee was ever paid, nor was the amount due him ever calculated, at the regular and overtime hourly rates set out in the contract as opposed to the wage for a four. When the em-

[1] In the case of other employees who worked 10 or 12 hour tours, the first five hours were classed as "regular" and the remaining five or seven hours as "overtime."

ployees worked a sixth tour, making a total of 48 hours, they were paid the tour wage as on other days; thus, the contract "overtime" rate was not applicable to all the hours after forty. When employees worked two tours in a day (16 hours) (R. 29, 35), they would be paid the tour wage twice and not the contract "regular rate" for four hours and "overtime" for all hours in excess of four. Likewise, there is no evidence that any employee ever received any amount but the tour rate regardless of whether he worked the full eight hour tour or only a part of it; on the contrary, the record supports the inference that employees were always paid for a full tour regardless of the number of hours.[6] Indeed, the company did not even keep records of the hours worked at the hourly rates. The controlling rate for every practical purpose was the tour wage.[7]

[6] Before the Act respondent credited employees with 8 hours for each tour whether they actually worked 8 hours or not (R. 111). Under its Poxon contracts respondent did not record actual daily hours worked, but only days, which it stipulated (R. 16, 18) were to be "deemed to mean a 'tour of duty' consisting of 8 hours work." The district court found that the employees continued to receive the same wages for a like amount of work as before the Act (R. 75).

[7] The contracts recited that the "regular rate" set forth in them should not apply to more than forty hours. Since it applied only to four hours of each tour, this would mean that the contract overtime rates would not be a real basis of payment until after eighty hours of work in a week. There is no contention that the employees ever worked such long hours—over ten 8-hour tours—or that such work was contemplated when the contracts were made.

No higher rates were paid for overtime hours. The contracts, if effective, served only the purpose of enabling the employer to pay the regular tour wage for all hours worked without paying an additional amount for the tours constituting hours in excess of forty as intended by the Act.

The district court (R. 83) and the circuit court of appeals (R. 117) held that under the decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, this system of payment did not violate Section 7.

The "advance" plan.—Prior to the effective date of the Act and for about two years thereafter respondent paid certain of its employees a regular monthly salary regardless of hours worked (R. 75). Subsequently respondent caused these employees to work under agreements setting forth a so-called "base or regular rate" for the first five hours of each ten or twelve hour "tour" and promising to pay one and one-half times that rate for the remaining hours in each tour. This part of the contract, it will be observed, was similar to the Poxon plan discussed above, but this group of employees was never compensated under the simple Poxon plan of payment. Their contracts, in addition, provided that if an employee's earnings at the hourly rates were less than a stated monthly sum, identical in amount with the previous monthly salary (R. 20, 21, 23, 24, 59, 61, 75–77), then respondent would "advance said employee the difference which shall apply on future over-

time payments; adjustment to be made on January 1st of each year and when said employment ceases." (R. 75–77.)

Later respondent changed the arrangement to recite an hourly rate for the first forty hours in the week with time and one-half for overtime. It continued on a biweekly basis the provision for "advances" (R. 77–79, cf. R. 37–38). The latter form of advance plan was in use at the time of the trial.

In fact, each employee working under this plan was paid outright his regular salary and not his earnings at the hourly rate set forth in his contract. In every instance the amount the employee received was the monthly or biweekly total specified in the contract—no more and no less. The pay rolls found in the record which are stipulated to have been typical contain not a single instance of an employee's receiving the exact amount of compensation he would have received had it been computed at the hourly "regular" and "overtime" rates recited in the "advance plan" contracts.* Occasionally, employees worked such hours as would

* The accuracy of this statement may be demonstrated by applying to the hours worked as shown on the payrolls in the record the appropriate contract hourly rates, "regular" and "overtime." For example, under the combination Poxon-advance plan, a truck driver was assigned a "regular" rate of 35 cents an hour for the first 5 hours in a 12 hour tour, with time and a half that rate for the remaining 7 hours (R. 75–77), equivalent to a "tour rate" of $\$5.42\frac{1}{2}$ (5×35, $\$1.75 + 7 \times 52\frac{1}{2}$, $\$3.62\frac{1}{2}$). In a pay period when he

entitle them at the contract hourly rates to compensation in excess of the amounts they had received, but those earnings were never paid (R. 79). When they worked less, no accounting was had of the so-called advances (R. 77, 79). Indeed, respondent's pay-roll records did not even show what sums the employees earned at the hourly rates recited in the contract (R. 49, 51, 65, 67, 69, 71).*

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worked 15 days of 12 hours each, he would have "earned," at these hourly rates, $81.38. Respondent paid him the salary amount of $82.50 (R. 65). Under the second version of the "advance" plan, when truck drivers were assigned an hourly rate of 46 cents an hour for the first 40 hours in each week, with time and a half for the overtime hours (R. 37–38, 77–79), if a driver worked 77 hours one week and 90 the next (R. 69), he would have earned in those two weeks, $43.93 (40×46, $18.40+37×69, $25.53) and $52.90 (40×46, $18.40, +50×69, $34.50) respectively, a total of $96.83. Respondent still paid him $80.80, the amount of the bi-weekly salary (R. 69). And in the last payroll in the record, on respondent's own figures, the employee's earnings at the contract "regular" rate plus time and a half, amounted to $69.23 (R. 71). He was paid $80.80. This payroll is the only one which shows on its face the amount of this discrepancy, the so-called "advance," which was $11.57.

* The six pay roll records to which reference is made in the text were included in the stipulation as typical of respondent's practices. The latest one (R. 71) attempts to show the amounts earned at the hourly rates, but even this pay roll record is not an accurate reflection of what occurred because the total hours shown included a credit of eight hours for days when the employees did not work. It will be observed that this pay roll was for a period after the complaint had been filed and shortly before the trial.

The district court and the circuit court of appeals held on authority of the *Belo* case that this method of payment constituted compliance with Section 7 (R. 83, 117).

REASONS FOR GRANTING THE WRIT

Section 7 of the Fair Labor Standards Act prohibits employing a person in commerce or in the production of goods for commerce for more than forty hours in a week unless he is paid for the overtime work at one and one-half times "the regular rate at which he is employed." Although the Act is five years old, the meaning of the term "the regular rate at which he is employed" gives rise perhaps more frequently than any other provision to difficult and disputed questions of interpretation.

In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, this Court held that where a weekly salary is paid to an employee for fluctuating hours, the "regular rate at which he is employed" is the weekly salary, and that the weekly salary is to be reduced to an hourly rate for purposes of computing overtime by dividing it by the hours worked each week. In *Walling* v. *Belo Corp.*, 316 U. S. 624, the Court held that this principle is not applicable where the employer pays his employees in accordance with a contract which guarantees them a fixed weekly salary and "specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of over-

time work beyond the maximum hours fixed by the Act" (p. 634). The Court concluded that when there was such a contract and when the basic rate set forth in the contract in fact was the basis for the employee's compensation, then the basic contract rate and not the salary was the regular rate of pay.

Several courts have emphasized the words quoted above from the *Belo* case and have held on its authority, without regard to its facts, that the "regular rate" specified in Section 7 may be any rate stipulated by contract not lower than the statutory minimum.[10] The decisions of the district court and the circuit court of appeals in the instant case are the most striking examples of these rulings, for they pressed the supposed rule so far as to decide that such a contract was controlling even though it was established that the basic rate stipulated in the contract had no practical significance. Such rulings result in large measure from the fact that the only difference between the *Missel* and *Belo* cases which the Court expressly mentioned was that "In the contract in that [Missel] case, there is no stated hourly wage and no provision for overtime" (p. 634).

[10] See also *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom*, *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944).

We believe that these decisions are based on a misunderstanding of the *Missel* and *Belo* cases and that they illustrate the need for a clarifying decision. The *Belo* case does not hold that the regular rate at which a man is employed can be fixed by contract for the purposes of Section 7 even though that rate is not the basis of the employee's compensation for his regular hours of work (*i. e.*, the first forty hours). The Court concluded that the hourly rate specified in the *Belo* contract was in fact one of two bases for the employee's compensation. The Court emphasized that the circuit court of appeals had "found that the contracts were 'actual bona fide contracts of employment and that they were intended to, and did, really fix the regular rates at which each employee was employed.'" The opinion answered the Administrator's argument that the hourly rate set forth in the contract was a fiction and not a basis for payment by pointing out (pp. 631–632):

> * * * when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guarantee. The record shows that in such a case, the employee is paid at the rate of $1.00 an hour (150% x $.67) for each hour of overtime. In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling.

And the Court then held that for the first forty hours also the 67 cent hourly rate was the basis for payment, the fluctuation in making up the guarantee being in the amount of the premium for overtime (p. 632). In other words, the *Belo* case decided no more than that an employer who *in fact* pays his employees a regular hourly rate for forty hours and at least one and one-half times that rate for overtime, does not violate the Act by guaranteeing the employees a minimum weekly salary and paying them in accordance with the guarantee, even though they may sometimes work less than the number of hours required to earn it.

The instant case cannot be brought within that ruling. Under the Poxon plan respondent did not attempt to guarantee the employees a minimum weekly salary but paid them only for the number of tours they worked. This fact alone distinguishes the *Belo* holding. *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10); *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.); *Walling* v. *Livernois*, 6 Wage Hour Rept. 672 (E. D. Mich. 1943). Also, since respondent always paid a uniform rate for every tour, it paid no higher rates for tours constituting hours in excess of forty than it paid for the first five tours; despite the statutory command, therefore, no higher rate is paid for overtime work than for work in the normal week of forty hours. In the

Belo case, the Court found that a higher rate was paid for overtime.

Equally significant is the fact that respondent's employees were compensated on the basis of the number of tours worked, or on the basis of the weekly salary, and never on the basis of the "regular rate" which the contracts recited. Under the Poxon plan respondent continued its prior practice of recording the number of tours worked and of paying the established wage for each tour; with few exceptions, it did not even keep records of the daily hours worked or compute the employees' earnings at the contract rate. Under respondent's "advance" plan there was a specified monthly or biweekly salary, but respondent kept no record of its employees' earnings at the hourly rates recited in the contract and, in contradistinction to the practice under the *Belo* plan, never in fact compensated the employees on the basis of the contract rates, or calculated the sums said to have been lent to them. The postulate on which the decision below necessarily is founded is not the ruling in the *Belo* case; it is the premise that an employer is free to fix by contract for purposes of calculating overtime under Section 7 a lower rate than the rate at which the employee is employed during his first forty hours of employment.

That premise, we submit, is plainly unsound. To permit the regular rate to be fixed by contract for the purposes of Section 7 without regard to the rates in fact paid for work during the first forty

hours would frustrate the Act's purpose to discourage overtime employment and deny the established principle that an employee cannot waive by contract the protection of a statute framed for his protection.

Section 7 of the Act aims at spreading employment in times when labor is readily available by making it more expensive to employ a certain number of workers in excess of forty hours a week than it would be to employ a larger number of men for forty hours. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578. If the phrase "the regular rate at which he is employed" is read with this purpose in mind, it is clear that "regular rate" means simply the rate for the ordinary, normal or usual, workweek—under the Act of forty hours—in contrast to the rate for extraordinary, abnormal or unusual hours. This usage accords with a long history of union practice distinguishing between "regular" work and "regular" rates and overtime.

Such a rate, of course, is a rate actually paid.[11] In the instant case, the "regular rate" of employees compensated under the Poxon plan was the tour wage paid for every tour; indeed, since a full tour wage seems always to have been paid, it would be difficult to say, even if the contract had meaning, whether the contract

[11] *Walling* v. *Belo Corp.*, *supra*, is not to the contrary; the Court concluded that the contract rate per hour was the rate actually paid.

rate for the first four hours of a tour or the contract rate for the second four hours was the "regular" rate of pay. Obviously, the only real regular hourly rate for the tour is the average of the two. And the "regular rate" of employees under the "advance" plan was their biweekly or monthly salary. They were paid exactly that salary—no more and no less. The record contains not a single instance of an employee's receiving the exact amount of compensation he would have received had it been computed at the hourly rates recited in the contract. The regular salary actually paid can easily be reduced to hourly rates if necessary for the purpose of computing the overtime compensation due. Cf. *Overnight Motor Co.* v. *Missel, supra.*

To permit an employer to stipulate in a contract, contrary to fact, what shall be the regular rate for purposes of computing overtime payments also denies the established principle that employees may not waive their rights under the Act. This principle applies, of course, to any contract by which an employee expressly waives in advance his right to premium pay for overtime under Section 7. *Overnight Motor Co.* v. *Missel, supra,* at 577; *D & L Production Co.* v. *Cuniff,* 165 S. W. (2d) 933 (Tex. 1942); cf. *Fleming* v. *Warshawsky & Co.,* 123 F. (2d) 622, 626 (C. C. A. 7); *United States* v. *Morley Const. Co.,* 98 F. (2d) 781, 789 (C. C. A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States for use of Harrington,* 305 U. S. 651. The contracts involved in the present case are nothing

more than attempts to write the substance of such a waiver in other verbiage.

Under the Poxon plan it was recited in the employees' contracts that instead of receiving $7 for an eight hour tour, they should receive a so-called "regular rate" or $.70 an hour for the first four hours of each tour and an overtime rate of $1.05 an hour for the next four, a total of $7; in fact, since they were never paid at the hourly rates and always received $7 a tour, i. e., $.87½ an hour, all that they were doing by the contract was waiving any higher rate of pay for hours over forty. The subterfuge is even more transparent in other applications of the Poxon plan. Some of respondent's employees, according to their contracts, worked five hours of "regular" time and seven hours of "overtime" in each shift. Under other variations, not present in this case, but nevertheless illustrative of its substance, the first hour of the week or of each shift is designated to be paid for at the "regular" rate and the remaining hours at "overtime" (see *Walling* v. *Alaska Pacific Consolidated Mining Co.*, Civ. No. 461, W. D. Wash.; *Walling* v. *Arctic Circle Exploration Co.*, Civ. No. 507, W. D. Wash.).

Under the "advance" plan the contract stated a regular hourly rate of pay, provided for payment of a regular salary, and recited that any payments in excess of the earnings at the hourly rates should be treated as a loan; here again, since those earnings were not calculated and the

loans were not collected, the contract in truth had no substance except to waive the employee's right to a higher rate of pay for overtime employment.

The *Belo* case does not uphold such contracts; the Court held that the "regular rate" recited in that contract had real meaning in determining the employees' compensation. (See pp. 14–15, *supra.*) The decision below, which validates the Poxon plan and the advance plan, raises new and disturbing questions in the administration of the Act.[12]

The prevalence of such contracts emphasizes the importance of a clarification of the issues discussed above. The Poxon plan was circulated by the American Mining Congress to its members and, despite the Administrator's express announcement of its illegality in 1940, in 1942 it was reported to the

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[12] The consistent aim of respondent's contracts, the avoidance of Section 7, is illustrated by its treatment of the lease pumpers. At first they received fixed monthly salaries regardless of hours (R. 75). Then they signed "advance" contracts for Poxon hourly rates and the same salaries (R. 75–77). Finally, respondent put them under the "X" plan, which the circuit court of appeals held invalid. Under that plan the employees stipulated that their regular rate was whatever figure was required to enable the employer to say that he was paying overtime without in fact actually paying anything in addition to the weekly salary (R. 80–82). This was done by including in the contract the following formula:

"Let X equal my regular or base hourly wage for each work week. X shall then be determined by multiplying X by the number of hours in each week which I work up to the first 40 and adding to it the number of hours worked in said work week in excess of said 40 hours time[s] 3X 2, which shall equal the compensation I receive for that week."

Administrator that the most frequent violation of the Act in the Western States and in Alaska grew out of its use. Other employers' associations and services have publicized similar contracts reciting a regular hourly rate of pay without regard to the actual wages paid as being methods of avoiding the payment of higher rates for overtime without decreasing the actual rate of pay for normal hours. The use of such contracts in their various forms is increasing.

The uncertainty and confusion prevailing in the inferior courts emphasizes the need for a decision by this Court upon questions of such importance even though, strictly speaking, there is no conflict between the circuits. A number of courts have declared that compliance with Section 7 under the *Belo* case depends on whether there is a contract of employment stipulating a regular rate of pay, thus strongly suggesting (although not actually holding) that the actual rate of pay does not control. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Lofton*; 136 F. (2d) 359 (C. C. A. 10), certiorari denied, No. 222, October 18, 1943; *Green* v. *Riss & Co.*, 45 F. Supp. 648 (W. D. Mo.); *Walling* v. *Cumberland & Liberty Mills Co.*, 5 Wage Hour Rept. 641 (S. D. Fla. 1942). Other courts, like the court below, have followed the

suggestion and actually held that the contract rate is determinative of the "regular rate" for purposes of Section 7 even though a different rate in fact was paid. *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom. Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed, 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944). For reasons set forth above, we believe that these decisions do not apply the *Belo* case correctly but were wrongly decided. Our view has been adopted in another group of cases holding that the *Belo* decision should not be carried beyond the facts before the Court and that the contract rates are not controlling unless they bear at least a reasonable relation to the wages paid. *Walling* v. *L. J. Mueller Furnace Co.*, 50 F. Supp. 561 (E. D. Wis.); *Walling* v. *Highway Express, Inc.*, 6 Wage Hour Rept. 363 (W. D. Tenn. 1943); *Walling* v. *Malone and Hyde, Inc.*, 6 Wage Hour Rept. 750 (W. D. Tenn. 1943); and see the statement in *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, 137 F. (2d) 176, 181, (C. C. A. 5) that "the regular rate is a factual element of wages."

Likewise there are conflicting decisions as to whether the promise of a weekly salary is an element necessary to the validity of a contract fixing the regular rate at a lower sum than the wages actually paid. In *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453, the Circuit Court of Appeals for the Tenth Circuit relied upon the absence of such a provision as the ground for distinguishing the *Belo* contract from the contract before it. Accord: *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.). In the instant case by approving the Poxon plan it rendered a contrary decision. See also *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 6 Wage Hour Rept. 1117 (M. D. Ala. 1943).

This confusion among the lower courts upon two important issues under Section 7 should be clarified by this Court because of the increasing importance of the question in the administration of the Act. The instant case raises the issues squarely and presents an appropriate occasion for their decision.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

CHARLES FAHY,
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Solicitor of Labor.

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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered by the District Court appear at R. 73–85. The District Court did not deliver an opinion. The opinion of the Circuit Court of Appeals (R. 115–119) is reported at 138 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 15, 1943. A petition

for a writ of certiorari was filed on February 14, 1944. It was granted as to the first question presented on March 27, 1944, and the cause was transferred to the Summary Docket, 321 U. S. 759. The Court requested counsel to discuss the question whether the case is moot. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Has the case become moot because about two months after the Administrator of the Wage and Hour Division instituted this statutory action for an injunction, respondent voluntarily ceased to pay its employees in accordance with the plan which is assailed as in violation of the statute, when respondent continued to defend it as legal throughout the trial and upon appeal?

2. Prior to the enactment of the Fair Labor Standards Act respondent paid certain employees a regular wage for each 8-hour shift, called a tour, regardless of the number of hours worked in the week. In order to avoid paying additional compensation for overtime under the Act, respondent caused these employees to execute agreements reciting that it would pay them a stated "regular rate" per hour for the first 4 hours of each 8-hour tour and one and one-half times that rate for the next four hours. The rate was fixed by a mathematical formula so that the total sum paid for

the 8-hour tour remained the same as it had been prior to the Act. Similar arrangements were made for tours of greater length. Respondent's employees were paid the same tour rate for tours worked beyond 40 hours in the week as for those worked before. The question presented therefore is whether an employee who received the same tour rate for tours worked in excess of the statutory maximum as for the first tours in the week was paid at a rate "not less than one and one-half times the regular rate at which he is employed", as required by Section 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*) are as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section.
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment

in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * *

(2) to violate any of the provisions of section 6 or section 7, * * *

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

STATEMENT

This case arose on a complaint filed in the District Court on May 3, 1941, by petitioner, the Administrator of the Wage and Hour Division, United States Department of Labor, under Sec-

tion 17 of the Fair Labor Standards Act to restrain violations of the Act (R. 4–9). The facts were largely stipulated (R. 13–72). Respondent is engaged in the production of oil and gas for interstate commerce and in drilling wells for such production by others (R. 73), and its approximately 400 employees admittedly are covered by the Act (R. 82, 89). Since October 24, 1938, the effective date of the Act, respondent has used various forms of employment agreements, several of which were the subject of this litigation. From the inception of the Act until July 15, 1941, respondent hired its drilling employees under the so-called "Poxon" or split-day contracts which are the subject of this appeal.[1] There is no dis-

[1] The Poxon plan and the second plan below appear in the contract set forth in Appendix A, *infra*, p. 50. Aside from the Poxon plan, which is before the Court, respondent inaugurated after the passage of the Act other methods designed to preserve its existing daily wage scales without extra payment for hours beyond the statutory workweek. (1) From the effective date of the Act to September 1940, respondent paid some of its men a fixed monthly salary, without regard to the hours worked; this method was held illegal by the trial court (R. 20, 21, 43–47, 23–24, 59–63, 75, 83). (2) Other employees were paid by the split-day plan combined with a provision for payment of the same monthly salary as that paid before the Act, a so-called "advance" making up any difference between the monthly payment and the sum earned on the split-day plan. Pay was never computed on the specified hourly rates, the monthly amount was regularly paid, and "advances" to the workers were never repaid (R. 21–22, 24, 31–32, 49, 65–67, 77). This arrangement was upheld by the lower courts and this Court has denied certiorari with respect

pute about the terms, the method of arriving at them, or the purpose of the contracts. Only their legality is in controversy. The Administrator contends that the contractual method of payment for work in excess of the statutory maximum workweek [2] does not satisfy the requirements of Section 7 (a) of the Act; respondent contends that it does (R. 10).

Prior to the effective date of the Act certain classifications of respondent's employees had worked eight-hour shifts, called "tours," and were paid a wage for each tour—$7.00 to helpers, for example. As a result of the Act they were caused to work under new contracts of employment incorporating the "Poxon" or split-day plan.[3]

The contracts divided each tour into two parts, the first four hours to be paid for at a specified hourly rate called the "base or regular rate," and the last four hours to be paid for at one and one-half times the "base or regular rate" [4] (R. 74, 75–

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to the question presented by that determination. On July 16, 1941, while this litigation was pending, respondent substituted three new methods of wage payments. See *infra*, p. 10.

[2] During the first year after the effective date of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[3] This method of payment and similar ones are frequently used, having been publicized through trade channels, and have come to be known by various names, sometimes, as in the case of the "Poxon" plan, by the names of the men who devised them.

[4] In the case of other employees, the tour was 10 or 12 hours and the contract split the day into two five-hour periods and into five- and seven-hour periods (R. 76).

77). The contracts recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week" (R. 74, 77). Admittedly, the so-called "regular" and the "overtime" hourly rates had been calculated to insure that the total wage for the tour would continue the same as before (R. 74, 112). The normal work day or tour was split and a sufficient number of daily hours were compensated at one and one-half times the base rate [5] to insure against the need of paying any sums in addition to the tour wage, even when the statutory maximum workweek was greatly exceeded.[6]

Under the contracts the number of hours in a tour never varied. Because the "regular rate" was derived from a computation backward from the daily wage (R. 112), the latter determined the former, and the employees continued to receive the same daily wage as before, regardless of whether

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[5] By splitting the 8-hour tour into 4 hours of "regular" time and 4 hours of "overtime", 40 hours at straight time would not be exceeded unless more than 80 hours were worked in a week. So, too, with the 10-hour tour split 5 and 5. The 12-hour tour wage, divided into 5 hours at "regular" pay and 7 hours at a time and one-half "overtime rate", would require additional payments only if the workweek were longer than 96 hours.

[6] A letter in the record (R. 112) from the respondent's attorney states: "This schedule was worked out about two weeks before the law went into effect. It was passed upon and approved by the executive board of the company * * * Notice was sent to all of the foremen in the field with instructions to notify the men of the change in wage scale."

they worked eight or sixty-four hours per week. For example, the "regular rate" assigned to helpers, who had formerly been paid $7.00 per tour, was fixed at $0.70 and the "overtime" rate at $1.05 so as to yield them the same $7.00 for an 8-hour tour.[7]

The purpose of these contracts was to avoid the payment of higher rates for the hours worked in excess of the statutory maximum without changing the wages paid for regular working hours. (Findings of Fact No. IV, R. 74; R. 75–77, 109–110; 111, 112.) Under the Act the statutory maximum workweek was reduced from 44 to 42 hours in 1939 and from 42 hours to 40 hours in 1940. Under its contracts, however, it was unnecessary for respondent to disturb the point at which its time and one-half rate was to start or make any other accommodation to the statutory changes. A helper paid $7.00 a tour throughout the week received $42.00 for a six-tour 48-hour week, $49.00 for a seven-tour 56-hour week, and so on, exactly the same pay as he received before the Act was passed. The pay was exactly the same for hours in excess of forty-four, forty-two, or forty as for the first forty-four, forty-two, or forty hours. An example of this arrangement is set out in Appendix A.

[7] The contract did not call the last four hours of the tour "overtime" but the time sheets used by respondent after 1940 did. See, for example, the time sheet at R. 33 which breaks down the hours and rates of pay into regular time ("R. T.") and overtime ("O. T.").

The evidence shows that the contract hourly rates were never used for any practical purpose. The controlling rate for all purposes was the tour rate. When employees worked a sixth tour, making a total of 48 hours, they were paid the tour wage as on other days; thus, the contract "overtime" rate was not applicable to all the hours after forty. When employees worked two tours in a day (16 hours) (R. 29, 35), they would be paid the tour wage twice and not the contract "regular rate" for four hours and "overtime" for all hours in excess of four.[5] Indeed, for two years after the effective date of the Act the company did not keep records of the hours worked at the hourly rates. Until October 1940 the time sheets

[5] In fact, there is no evidence that any employee ever received any amount but the tour rate regardless of whether he worked the full eight-hour tour or only a part of it; on the contrary, the record supports the inference that employees were always paid for a full tour regardless of the number of hours actually worked. Before the Act respondent credited employees with 8 hours for each tour whether they actually worked 8 hours or not (R. 111). Under its Poxon contracts respondent did not for two years record daily hours worked, but only days (R. 27–29), which it stipulated (R. 16, 18) were to be "deemed to mean a 'tour of duty' consisting of 8 hours work." And for the period when hours worked were shown on the time sheets the record fails to disclose a single instance in which any number of hours other than the exact number of hours in a tour was listed as having been worked. The District Court found that the employees continued to receive the same wages for a like amount of work as before the Act (R. 75). See also the testimony of the employee Beatty at R. 100.

merely listed the number of days worked and the daily rate (R. 27, 29). After that time the time sheets listed the number of hours of "regular time" and "overtime" (R. 33); but, as shown above (n. 8), the hours recorded appear to have been the assumed full tours rather than the actual hours worked. In calculating the wage earned for each pay period it was therefore unnecessary to calculate the hours worked at the base rate and those at the overtime rate, but merely to multiply the number of tours worked by the tour rate. The controlling rate for every practical purpose was the tour wage.

The District Court (R. 83) and the Circuit Court of Appeals (R. 117) held that under the decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, the foregoing system of payment did not violate Section 7.

Over two months after the Administrator began this action to compel respondent to cease its violations, respondent discontinued the use of the split-day contracts and substituted several other types of contracts. One of these concededly complies with the Act.* Another was sustained by the lower courts against the contention by petitioner

*Some classes of employees were paid an hourly rate plus time and one-half for hours worked over 40 (R. 19, 37). There was no specified total payment and no "advance". This method complies with Section 7.

that it was illegal.[10] A third was found bad by the Circuit Court of Appeals.[11] In granting certiorari upon the question of the legality of the Poxon plan, this Court has asked for a discussion of the question whether the case is moot.

SPECIFICATION OF ERRORS

The court below erred:

1. In holding that the "base or regular" rates specified in the contracts between the respondent and its employees were the "regular rates" at which the employees were employed within the meaning of Section 7 of the Fair Labor Standards Act.

2. In holding that the payment of one and one-half times the specified "base or regular" rates, which respondent's contracts provided as payment

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[10] This plan is a variation of the second arrangement described in n. 1, p. 5 *supra*. For some employees, the split-day feature was replaced by payment for the first 40 hours in each calendar week at a "regular" hourly rate, with time and one-half for additional hours; a stipulated periodical payment was made bi-weekly instead of monthly, and the "advance" feature was retained (R. 24–25, 37, 69–71, 79, 103). Both the trial court and Circuit Court of Appeals sustained this method of payment and this Court denied certiorari.

[11] For other employees, an entirely new scheme was devised, the X plan, under which the hourly pay was called X and was found each week by the formula X = weekly wage ÷ (40 + 1½ times the number of hours worked beyond 40). The employees were paid a fixed sum every two weeks, regardless of hours worked (R. 22, 53). The trial court held the X plan valid (R. 83), but the Circuit Court of Appeals reversed (R. 119).

for the latter hours of the daily tours, satisfied the requirement of Section 7 that respondent pay its employees for work in excess of the statutory maximum workweek at a rate not less than one and one-half times the regular rates at which they were employed.

3. In failing to hold that the regular hourly rates were the tour wages divided by the number of hours in a tour.

4. In failing to find that, as respects workweeks longer than the maxima prescribed in the Act, the respondent had violated Sections 7 and 15 (a) (2) of the Act.

5. In failing to hold that the respondent had violated Section 15 (a) (1) of the Act by selling, shipping, delivering, transporting, and offering for transportation in interstate commerce goods in the production of which employees compensated under the contracts in question were employed in violation of Section 7 of the Act.

6. In failing to reverse the judgment of the District Court in so far as it denied petitioner's prayer for an injunction with respect to the contracts in question and the shipment of goods in the production of which employees had been compensated under those contracts.

SUMMARY OF ARGUMENT

I

Respondent's discontinuance of the challenged method of compensation after petitioner's suit to enjoin its use was instituted did not render the case moot. The controversy between the parties still exists. Respondent throughout the trial and upon appeal has steadily urged that its contracts were legal, and the judgment below leaves it free to resume the challenged conduct. Respondent's consistent purpose of avoiding the financial burden of Section 7 and use of numerous plans to that end make resumption of the device in issue not improbable.

From *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897) to *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 (1944), this Court has repeatedly held that suits for injunction brought by Government enforcement agencies do not become moot merely because the defendant is not engaging in the action complained of at the time the judgment issues. Voluntary discontinuance by the respondent of the unlawful conduct does not render it impossible for the court to grant petitioner effective relief. An injunction will have force and operative effect with respect to respondent's right to resume the activity and the Administrator's power to prevent its doing so. The petitioner's

duty to enforce the Fair Labor Standards Act as a "substantial trustee for the public" requires that he secure the judgment of the Court on the legality of the plan in issue as it may in the future be used by respondent and others.

II

A. Respondent's split-day employment contracts do not meet the requirements of Section 7. The legislative purpose of the Section was to make employment beyond the statutory maximum workweek more costly to the employer and more remunerative to the employee than work during this period and thus to deter by its burden employment beyond the statutory period. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–578. Under respondent's plan, tours worked beyond the statutory maximum were paid for at precisely the same rates as those worked before the maximum was reached. The plan simply provided a fixed daily wage for a fixed day's work, continuing the arrangement in operation before the Fair Labor Standards Act. Under its contracts respondent could work its employees 80 hours a week, and in some instances more, without paying anything in addition to the regular tour wages. The judgment below permits the parties to substitute an 80-hour maximum workweek for the 40-hour maximum prescribed by the Act.

B. The "base or regular" rates specified in the

contracts were not the "regular rates" at which the respondent's employees were employed and upon which "time and one-half" must be paid for overtime work. If the penalty rate of 150 percent prescribed by Section 7 is to have the effect intended, it must be based upon the rate which is actually paid for nonovertime hours. In this case the "regular rate" is the tour rate, which the employee received day in and day out. The "regular" hourly rate was the tour wage divided by the number of hours in the tour. Respondent failed to pay its employees time and one-half this rate.

Under respondent's contracts, the specified "base or regular rate" was allocated not to all the normal working hours but to a fraction of the customary workday. So, too, the rate of one and one-half times the stipulated "regular" rate was not extra compensation for real overtime hours, either daily or weekly, but payment for a designated part of the normal workday or tour. When the employee really worked overtime, he did not get the higher rate for the excess hours. For example, when he worked 16 hours a day (2 tours), he received the tour rate twice and not time and one-half for all hours over 4 or for the 8 hours which were added to the normal workday.

C. The decision of this Court in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, upon which the lower courts relied, does not sustain the validity of re-

spondent's contracts. In the *Belo* case this Court held that under the facts there involved the "basic rates" contracted for did actually control the employees' compensation, and the employees were paid "not less than time and one-half" that rate for hours over forty. In the instant case the designated "regular" rates had no demonstrable effect in determining the employees' weekly compensation except in the situation—which never in fact occurred—that the employees worked more than 80 or 96 hours.

The *Belo* decision does not announce the principle applied by the court below that the parties may by contract fix any rate they choose as the "regular rate" to which the overtime multiple is to be applied, regardless of its relationship to the employer's wage cost. Although rates of pay result from consensual arrangements between employer and employee and the regular rate is derived from the weekly wage cost which these rates produce, the contracting parties may not by their mere assertion determine what the regular rate shall be for the purpose of meeting the requirement of Section 7. To hold that they may would defeat entirely the legislative purpose. Section 7 was intended to limit the rights of the parties to contract with respect to compensation for hours in excess of the statutory maximum workweek. Section 7 (b) indicates the restricted field in which Congress intended that the requirements of Section 7 (a) could be relaxed by agreement.

ARGUMENT

I

UNDER THE DECISIONS OF THIS COURT DISCONTINUANCE OF AN UNLAWFUL COURSE OF CONDUCT DOES NOT RENDER THE GOVERNMENT'S SUIT FOR AN INJUNCTION MOOT WHEN SUCH CONDUCT MAY BE RESUMED AT RESPONDENT'S OWN VOLITION

As the statement of facts shows, the respondent since the passage of the Fair Labor Standards Act has utilized a variety of wage plans, all designed to maintain without change preëxisting wages for workweeks in excess of the statutory maximum (R. 74, 108–112). For a period of two years from the date of the Act, certain classes of employees were paid a flat monthly salary irrespective of the number of hours worked, in plain violation of the overtime requirements of the Act (Findings of Fact VIII, R. 75; Conclusions of Law III, R. 83). See *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. The continued use of this arrangement was enjoined by the District Court (R. 83, 84).[12] For about three years after the effective date of the Act and until two months after the institution of this suit,[12] the respondent paid many of its employees in accordance with the so-called Poxon or split-day plan which is in issue here. The discontinuance of the Poxon plan did

[12] Some of the new contracts were in fact not signed until September 1941 but they were made retroactive to July 16, 1941 (R. 103, 104). The complaint was filed May 3, 1941.

not result in full compliance with the provisions of Section 7 as interpreted by the court below. Lease pumpers were paid, at least up to the time of trial, under the so-called "X Plan" which the Administrator contended and the Circuit Court of Appeals found to be in violation of the Act (R. 117–119).

Respondent has not disclaimed an intention to revert to the use of the Poxon plan.[13] It has sought in both lower courts a determination of the validity of that method of payment even after its use was discontinued.[14] In its pleadings and at the trial, respondent maintained that all its methods of compensation used since 1938 were legal in-

[13] There is no evidence in the record as to whether respondent has utilized the plan since it was upheld by the lower courts.

[14] The District Judge at a pre-trial hearing requested briefs on the question whether an injunction should issue if respondent was found to have been in compliance since July 16, 1941. The attorneys for respondent advised the Court that "after a careful study of plaintiff's brief * * * and * * * an independent check of the authorities" they had "come to the conclusion that in an action by the Government to enjoin violations of penal statute such as that in question, that the cessation of said alleged violation after suit is filed does not render the question moot to the extent that a court of equity should not grant the injunction if prior violations are proved. Especially in the absence of proof of good faith and other extenuating circumstances relating to the violations such as uncertain interpretations of new laws, acting on advice of counsel, etc." (Letter from Settle, Monnet & Clammer to Honorable Judge Royce H. Savage dated March 10, 1942.)

No contention that the case had become moot was made by respondent in the Circuit Court of Appeals.

cluding the Poxon plan here in issue. It took the same position before the Circuit Court of Appeals. Both lower courts ruled upon the validity of the plan.

The mere discontinuance of the acts assailed as unlawful after action is brought to have them enjoined does not render the case moot. Cases and controversies which the federal courts are empowered to decide do not evaporate when the defendant merely ceases the conduct in issue. When this suit was brought, the parties were in disagreement as to the validity of the challenged plan of compensation.[15] At that time there was certainly a case or controversy over which the court had jurisdiction. The same dispute between the parties continues. Although respondent later discontinued the use of the contracts in question, it has steadily maintained through the trial and upon appeal that they complied with the requirements of the Act. No promise has been made not to resume them. Even if there had been such a promise, the case would not be moot, since voluntary discontinuance of unlawful practices, although accompanied by such a promise, does not remove a case from the judicial power. *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7).

[15] The Administrator publicly announced his view that the split-day plan was unlawful in July of 1940. In a revision of his Interpretative Bulletin No. 4 a plan similar to that of respondent was described (par. 70 (4)) and the position was taken that it did not comply with Section 7.

A case becomes moot under the principles announced by this Court, when "without any fault of the defendant" [16] a supervening "event * * * renders it impossible for this court * * * to grant [plaintiff] any effectual relief whatever * * *", *Mills* v. *Green*, 159 U. S. 651, 653; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 515, or when "there is no subject-matter on which the judgment of the court can operate," *Ex parte Baez*, 177 U. S. 378, 390; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217; *St. Pierre* v. *United States*, 319 U. S. 41, 42. If cessation of the challenged conduct is caused by forces beyond the control of the parties, the case may become moot. *United States* v. *Hamburg-American Co.*, 239 U. S. 466; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

Where, however, a defendant has voluntarily ceased the activity sought to be restrained before judgment issues, an injunction or other preventive order still has force as applied to his future conduct. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334; *cf. St. Pierre* v. *United States*, 319 U. S. 41, 43. The judgment prevents

[16] Voluntary dissolution of a corporate defendant against which the District Court had granted an injunction, pending an appeal by the Administrator from a Circuit Court of Appeals' judgment of reversal, was held by this Court not to render the case moot. *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671.

him from resuming the activity in question. A long line of cases has therefore proceeded to adjudication in this court notwithstanding the abandonment of the practices sought to be enjoined. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Comm.* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *J. I. Case Co.* v. *National Labor Relations Board, supra.* This principle applies to injunction suits against the Government as well as to those brought on its behalf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 497, 516. See also *McGrain* v. *Daugherty*, 273 U. S. 135, 180–182. Accordingly, discontinuance by a violator of an illegal course of conduct has not precluded restraint of possible future violations at the instance of the Government [17] or one of its enforcing agencies such as the Federal Trade Commission,[18] the Securities and Exchange Commission,[19] the Office of Price Administration,[20] or the National Labor

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[17] *United States* v. *Trans-Missouri Freight Assn.*, *supra.*

[18] *Federal Trade Comm.* v. *Goodyear Tire and Rubber Co.*, 304 U. S. 257, 260; *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7); *Guaranteed Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853, 859, 860 (C. C. A. 2).

[19] *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579 (C. C. A. 6); *Securities and Exchange Comm.* v. *Torr*, 22 F. Supp. 602 (S. D. N. Y.).

[20] *Hecht Co.* v. *Bowles*, 321 U. S. 321.

Relations Board.[21] It would be difficult to justify the application of different principles in the enforcement of the Fair Labor Standards Act.

In the enforcement through nation-wide litigation of a statute such as the Fair Labor Standards Act the Administrator acts "as a substantial trustee for the public." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. at p. 309. See also *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 674–675. He was given no power to determine by regulations or orders whether particular methods of payment comply with the provisions of the Act. "* * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523. It is therefore only through adjudication of particular controversies in suits brought to enjoin alleged violations that general principles as to the scope and meaning of the statute can be educed. Paraphrasing the language of this Court in *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308–310, it may therefore be said that the most important object of this litigation is not to get respondent to discontinue the use of the split-day plan, but

[21] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334; *National Labor Relations Board* v. *Pittsburgh Greyhound Lines*, 309 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230.

to determine the legality of the plan as it may in the future be used by this respondent and others.[22] *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 334–335 (C. C. A. 8); *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102, 105 (C. C. A. 4).

The realities of the enforcement problems of the Administrator make it no adequate answer to point to his ability to institute a new action if respondent should resume the practice which was abandoned "in prophecy of or dread of suit" (*United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 445). His enforcement task is vastly different from the prosecution of purely personal rights by a private litigant in a suit for equitable relief. See *United States* v. *San Francisco*, 310 U. S. 16, 30–31. Sound administration compels careful review by the Administrator and his staff of the issues involved in every instance of proposed litigation, together with careful investigation and confirmation of the operative facts. Whereas the private litigant usually becomes immediately aware

[22] The decision of the lower courts unreversed would encourage other employers to inaugurate or continue the use of the plan. *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 335 (C. C. A. 8). The Poxon plan has been circulated among metal mining operators and Wage and Hour Division officials have reported its extensive use in the mining industry in the Western states and in Alaska. Experience with enforcement of the Fair Labor Standards Act has shown an increase in the use of plans to avoid the cost of Section 7 upon their validation by the Circuit Courts of Appeals when review by this Court is not sought or is denied.

of a renewal of the injury by his adversary, a Government agency is able to ascertain a resumption by a violator of his injury to the public only after the duplicated effort and expense of another inspection. Moreover, if discontinuance renders the action moot, the bringing of a new suit when the practice is resumed will not insure the determination of the issue. If respondent once more shifts to a different method of payment,[23] the Administrator's new inspection and suit will again be futile. See *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579, 583 (C. C. A. 6). Thus, even the maintenance by the Administrator of an uninterrupted vigil over this employer—a practice wholly undesirable, even if not administratively impossible—might not enable him to obtain an adjudication of the issues presented by respondent's violations.

Resumption of the challenged practices by respondent is not improbable. The contracts have been declared valid by the courts below. Respondent has always maintained that they were legal. Its consistent aim has been to avoid the payment of additional compensation for statutory overtime, while retaining the same work schedules. Respondent persisted in computing the wages to some of its employees under the illegal "X contract" down to the date of trial, and presumably

[23] The employment contracts used by respondent after discontinuance of the Poxon plan are terminable at will by the employer. See e. g. R. 38.

until the adverse ruling of the Circuit Court of Appeals (R. 22, 80). The abandonment of the contracts in question is "no assurance * * * that petitioner [respondent] if it could shake respondent's [petitioner's] hand from its shoulder, would not continue its former course". *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307, 310 (C. C. A. 7); *Guarantee Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853, 860 (C. C. A. 2); see also *Juvenile Shoe Co.* v. *Federal Trade Comm.*, 289 Fed. 57, 59–60 (C. C. A. 9). As in *Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395, 399 (C. C. A. 5), affirmed, 317 U. S. 564,[24] "This case is not one where the violations were dead issues at the filing of the suit; nor was cessation entirely voluntary, but was the result of recent official pressure." The prties are still in serious disagreement over the point of law; "it is clear there had been recent violations, and there was still contention, and this is enough to ground the grant of injunction upon." *Ibid.*

[24] The decisions of other Circuit Courts of Appeals in suits brought by the petitioner have been conflicting. In *Fleming* v. *Cincinnati Union Terminal Co.*, 117 F. (2d) 1012 (C. C. A. 6), the defendant altered its plan of compensation subsequent to the filing of the complaint and claimed that the new plan constituted compliance which rendered the controversy moot. The validity of the new plan was not challenged. The Circuit Court of Appeals for the Sixth Circuit reversed the District Court's judgment of dismissal, holding that the case presented "justiciable issues which [the Administrator] has a right to have determined." The Circuit Court of Appeals for the Fourth Circuit has granted an injunction although the

See also *Otis & Co.* v. *Securities and Exchange Comm.*, 106 F. (2d) 579, 584 (C. C. A. 6).

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defendant discontinued its business pending appeal. *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102. In *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C. C. A. 8), an injunction issued although defendants pending appeal had been "liquidated in bankruptcy" and had apparently ceased to do business. In both the *Haile* and *Mutual* cases the courts rejected the contention that the cases had become moot. In *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395 (C. C. A. 10), the defendant pleaded by supplemental answer that it had entered into a collective bargaining agreement prescribing a new method of wage payments which complied with the Act. The court found that at a pretrial conference "counsel for the administrator * * * stated that they did not dispute * * * the statement of counsel for the company that it intended in good faith to comply with the Act" (p. 396). Dismissal of the complaint was affirmed apparently both because the case was thought to have become moot and because the denial of an injunction by the District Court was not an abuse of discretion. Murrah, C. J., dissenting, was of the view that the later compliance did not remove the controversy between the parties as to the legality of the plan and that the Administrator was still entitled to have that controversy adjudicated. In *Walling* v. *T. Buttner & Co.*, 133 F. (2d) 306 (C. C. A. 7), certiorari denied, 319 U. S. 771, the trial court granted an injunction although the defendant had discontinued the challenged conduct before the complaint was filed. The Circuit Court of Appeals reversed. It did not find the controversy moot; but because it concluded that there was no probability of violations being resumed, it held that an injunction "was not authorized" (p. 308).

In *Walling* v. *Florida Hardware Co.*, 142 F. (2d) 444 (C. C. A. 5), the district court's denial of an injunction was upheld since the "inadvertent" violations of the defendant were discontinued before the judgment was entered. The Circuit Court of Appeals pointed out that the Administrator had the benefit of the findings and conclusions of the trial court and received a judgment for costs.

Of course, the issue here is not the propriety of injunctive relief. Even in a case in which an injunction is not warranted because the violations have ceased and resumption is not likely, other relief may be afforded and the cause is therefore not moot. The case may be retained on the calendar, or a decree framed so that the court can deal summarily with future violations on the basis of the trial already had. See *Walling* v. *John J. Casale, Inc.*, 51 F. Supp. 520, 526–527 (S. D. N. Y. 1943); *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 378. Cases holding that where violations have ceased with little probability of recurrence no injunction will be granted, of which *United States* v. *United States Steel Corp.*, 251 U. S. 417, is typical, mean only that injunction is not the proper relief, not that the case is moot. If this Court should decide that the agreements are invalid, the judgment below would presumably be reversed and the cause remanded so that the District Court can determine whether an injunction should issue or some other form of relief be granted.

The legality of respondent's conduct in using the contracts and its right to use them again are still in issue and require the judgment of this Court. Its decision on the merits will affect respondent's right to resume that conduct and petitioner's power to prevent it. Thus effective re-

lief can be granted. Both parties sought to have the courts below decide whether respondent's conduct was in violation of the statute. See *Federal Trade Comm.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 259. For these reasons, it is respectfully submitted that the case is not moot.

II

RESPONDENT'S WAGE CONTRACTS DO NOT SATISFY THE REQUIREMENT OF SECTION 7 THAT WORK BEYOND FORTY HOURS IN THE WEEK BE PAID FOR AT ONE AND ONE-HALF TIMES THE REGULAR RATE

A. *The plan provides a fixed daily wage which affords no additional compensation for hours over 40 a week—it substitutes an 80-hour maximum workweek for the statutory maximum.*—In the *Missel* case (*Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572) this Court rejected the contention that a weekly salary "which amounted to the required minimum for regular hours and time and a half the minimum for overtime" satisfied the requirements of Section 7 of the Act. The Court has also rejected a similar contention made with respect to a daily wage large enough to compensate the employees "in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours." *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93. The *Missel* case held that the "intended effect" of Section 7 (a) to require "extra pay for overtime

work by those covered by the Act even though their hourly wages exceeded the statutory minimum" is "clear and unambiguous" (p. 577). The test to determine whether a plan of compensation complies with the overtime provisions of the Act is to ascertain whether it provides the specified increased pay for overtime work. The overtime with which the Fair Labor Standards Act is concerned is work beyond the prescribed statutory workweek of 40 hours. The "unit of time * * * within which to distinguish regular from overtime is the week." *Missel* case at p. 579. The additional 50 percent pay required by the Act is for hours worked beyond the prescribed number in the week.

Respondent's wage scale was simply a fixed wage for a fixed day's work and did not meet these requirements.[25] No greater payments were made

[25] The Administrator, in reissuing his Interpretative Bulletin No. 4 in July 1940, added a consideration of special problems presented by Section 7 of the Act and in Par. 70 (4) expressed the conclusion that a described plan similar to that of the respondent did not comply with the Act. Par. 70 (4) as subsequently revised for the 40-hour week reads:

"Suppose an employee was paid $4.04 a day prior to the effective date of the act for a normal workday of 8 hours. His workweek consisted normally of 6 workdays. Thus he earned $24.24 a week for a workweek of 48 hours. The parties agree that henceforth the employee's rate of pay will be 46.5 cents an hour for the first $6\frac{2}{3}$ hours of the day and 70 cents (one and one-half times 46.5 cents) for the remaining $1\frac{1}{2}$ hours. The employee will continue to

for work during weekly overtime hours than for work during non-overtime hours. The workweek was reduced to a factor of no significance.[26] Instead the latter portion of each tour was treated as overtime payable at the designated overtime rates, with the purpose that when more than 40

receive $4.04 a day or $24.24 for a 48-hour workweek. * * *. The division of a normal 8-hour workday into 6⅔ straight-time hours and 1⅓ overtime hours is purely fictitious. The employee is not paid at the rate of 46.5 cents an hour and the alleged overtime rate of 70 cents is not paid for overtime work. * * * The employee will continue to receive $4.04 a day for a normal 8-hour day. His regular rate of pay is not 46.5 cents—which is a fictitious bookkeeping rate adopted solely as the basis upon which to compute overtime in order to evade the requirements of section 7 of the act—but 50.5 cents an hour [$24.24 ÷ 48 = 50.5 cents]. See pars. 16 through 27 of this bulletin. For a workweek of 48 hours the employee should receive $26.28 ([40 × 50.5¢] + [8 × 76¢])."

The Administrator's interpretations of Section 7, while they do not purport to be binding, have been held by this Court to "carry persuasiveness." *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 580–581, n. 17. See also *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549.

[26] The change in the statutory maximum workweek from 44 to 42 hours in 1939 and to 40 hours in 1940 required no change in the respondent's scheme. The tours continued to be "split" at the same points and the same tour rates applied. In 1938 when the statutory maximum was 44 hours respondent could, under these contracts, work its employees 88 hours in the case of 8- and 10-hour tours and 105.6 hours in the case of 12-hour tours, without additional compensation beyond the regular daily rate. In fact, however, 64 hours seems to have been the longest and 56 hours the usual workweek which respondent's employees worked (R. 29).

hours had been worked, enough "overtime" would already have been accumulated during the earlier portion of the week to render additional payments for weekly overtime hours unnecessary. The provision in the contract that the base rate should not apply to more than 40 hours had only theoretical significance. It meant only that in the unlikely situation—which never in fact occurred—that employees worked more than 80 hours per week (in the case of those working an 8-hour tour) or 96 hours (for those working a 12-hour tour) additional compensation would theoretically become due because the "base rate" would otherwise apply to more than 40 hours.

Under respondent's contracts, work beyond the statutory week was paid for at exactly the same rate as work during it. The same rate was applied to every tour though 6 or 7 were worked in the week and the 40-hour maximum was exceeded. A mechanic received $7.00 for the first 8-hour tour in the week and $7.00 for a 7th tour, although he was then working a 56-hour week. For the 57th hour (the first hour of an eighth tour) the pay under the contract was the same as for the first hour of the week. For the 61st hour (the fifth hour of the eighth tour) the employee got the same amount as for the 5th hour of the week. Designating the last four hours in each tour as overtime hours to be paid for at time and one-half the rate specified for the first four hours did not

provide a higher rate for the hours worked beyond 40. It is thus apparent that the hours worked in a week did not affect the rate of compensation paid. The controlling consideration for every practical purpose was the tour rate just as it had been before the Act was in existence.

Respondent's arrangement does not provide compliance with the overtime provisions of the Act. Section 7 was designed to spread employment by making it more costly to employ a certain number of workers in excess of 40 hours a week than it would be to employ a larger number for 40 hours.[27] *Missel* case, *supra*, pp. 577–8. "The Fair Labor Standards Act sought a reduction in hours to spread employment * * *." *Southland Co.* v. *Bayley*, 319 U. S. 44, 48. See *Bunting* v. *Oregon*,

[27] That during the post-war reconversion period reliance will once more be placed upon Section 7 to "spread the work" was emphasized by War Mobilization Director James F. Byrnes in a letter to the President dated September 7, 1944. Mr. Byrnes recommended return to a 40-hour workweek in civilian industries after the termination of the European phase of the war. "This will give jobs to those who are left without employment."

Mr. Byrnes also suggested that the 48-hour workweek remain in effect with respect to employees engaged in war production. The increased earnings from the "time and one-half for the extra eight hours" in war industries would serve as a "financial incentive" which might "induce workers to remain in war production instead of returning to civilian employment at lower earnings under a 40-hour straight-time week."

The letter is printed in the N. Y. Times for September 10, 1944, at p. 41, col. 5.

243 U. S. 426, 436. The Act was intended "to require extra pay for overtime work", even where the hourly wage exceeds the minimum (*Wessel* case at p. 577), and therefore required payment of the employees at a premium rate of 150 percent for the "burden of a workweek beyond the hours fixed in the Act" (*id.* p. 578). Respondent substituted for the statutory maximum workweek of 40 hours a maximum workweek of 80 hours, since it was only for hours in excess of 80 that an increased rate of compensation became payable.[28]

B. *The rates stipulated in respondent's contracts for the first hours in the tour were not the "regular rates at which" its employees were employed.*—Although the words "regular rate" are words of colloquial speech, in Section 7 they have a special meaning. The Act, however, has not supplied that meaning in a stated definition, but leaves it to be derived from two sources:[29]

(1) The statutory purpose of Section 7, to spread the work by making overtime work more costly to the employer and to make such work more remunerative to the employee than nonovertime work, and

[28] Moreover, under its contracts respondent would have been required to pay at an increased rate for only one-half the number of hours over 80, since the latter half of each tour already carried the increased rate.

[29] Problems of construction of the Fair Labor Standards Act are not to be "solved simply by a literal reading" of the particular section of the Act but "in the light of the purposes which led to the enactment of the entire legislation." *Southland Co.* v. *Bayley*, 319 U. S. 44, 47.

(2) The use of "regular rate" in Section 7 to designate the base upon which the multiple rate prescribed for overtime work is to be computed.

Considered in this light, "regular rate" can only mean the rate for the ordinary, normal, or non-overtime workweek—40 hours under the Act—in contrast to the rate for extraordinary or unusual hours.[30] The time and one-half rate designated for overtime work has its prescribed meaning only if it is a multiple of the rate which is paid for work for which no premium is required. See *Cabunac* v. *National Terminals Corp.*, 139 F. (2d) 853, 854 (C. C. A. 7); *Walling* v. *Wm. Schollhorn Co.*, 54 F. Supp. 1022 (D. Conn.); *United States* v. *Myers*, 320 U. S. 561, 573. This usage accords with the practice of distinguishing in collective-bargaining agreements between "regular" work and "regular" rates of pay on the one hand and "overtime" work and rates on the other. See *Hours of Work Provided in Collective Agreements in 1937*, 46 Monthly Labor Rev., 341, 345–346 (1938); *Union Agreement Provisions*, Bull. No. 686 (U. S. Dept. of Labor, 1942), 84, 91. The use in Section 7 of a multiple of the "regular rate" as a method of requiring increased compensation for overtime work is a familiar legislative

[30] This usage meets the dictionary definition of the word "overtime" which is defined as "time beyond, or in excess of, a set limit; esp., extra working time." *Webster's New International Dictionary* (unabridged 1943 ed.).

formula.[31] See *Bunting* v. *Oregon*, 243 U. S. 426, 434.

The "regular rate," of course, must be a rate actually paid if the 150 percent is to be in fact increased compensation. It must be the actual labor cost for nonovertime hours if Section 7 is to "deter by its burden" (*Bunting* v. *Oregon*, 243 U. S. 426, 436), to the extent intended, the working of hours beyond the statutory maximum. In the instant case the "regular" rate of employees compensated under the Poxon plan was the tour rate paid for every tour.[32] This was the rate every employee received for working throughout the week. It was the base cost to respondent of the

[31] A number of illustrative state statutes requiring increased compensation for overtime work are collected in Appendix B, *infra* pp. 52–53. Some of these statutes and orders speak of straight time compensation as the "regular" rate. Others refer to the "normal" rate. Still other state statutes illustrate that "time and a half" has a sufficiently familiar meaning to be understood without specification of the base.

[32] Since Section 7 requires the increased compensation to be on an hourly basis, the regular rate must be converted into its hourly equivalent. And since the "unit of time" under Section 7 is the week, the weekly nonovertime compensation divided by the hours worked yields the regular hourly rate (*Missel* case, *supra*, pp. 579–580). Piece rates, day or tour rates, and biweekly and monthly salaries must first be converted to their weekly equivalents to determine the regular hourly rate for the week involved. See pars. 8 and 10, Interpretative Bulletin No. 4, *supra*, note 25, p. 29. In the instant case the tour rate divided by the number of hours in the tour will yield the same rate as the weekly wage divided by the number of hours worked in the week.

labor of its employees. The same rate was paid for tours worked before 40 hours as for those worked thereafter, and the "regular" rate which the employee received for each hour worked was the tour rate divided by the hours in the tour. A helper who was paid $7.00 for each 8-hour tour whether it was the first or seventh in the week was being paid $0.875 per hour. This was his regular rate in the statutory as well as in the everyday sense. It did "not vary for the entire week." *Missel* case, *supra*, p. 580. It was the rate he received for all hours worked, nonovertime and overtime. It was the cost to the respondent for every hour of his employee's work. For hours in excess of 40 the employee should, because of the statute, have received one and one-half times that rate, or $1.263. Since no such employee was paid $1.265 for the hours worked over 40, the requirements of section 7 of the Act plainly were not met.

The base rates specified in respondent's employment contracts were not the "regular rate[s] at which [its employees were] * * * employed" within the meaning of the statute, nor were they the hourly rates paid before the Act. They were unreal and fictitious. They were concededly designed by respondent to permit continuation of its method of paying the same daily wage for each day worked regardless of the number of hours

worked in the workweek.[33] They were allocated by the contract not to the normal working hours but to a fraction of the normal workday. So, too, the time and one-half the stipulated "regular" rate was not extra compensation for real overtime hours, either daily or weekly, but payment for designated hours worked in the *normal* workday or tour (the last 4 in the 8-hour tour, the last 5 in the 10-hour tour, and the last 7 in the 12-hour tour). Since the normal workday had been 8, 10, and 12 hours for the respective classes of employees both before and after the passage of the Act, it is apparent that the hours for which the "overtime" pay was allocated were never in fact overtime hours.

The artifice of the arrangement is made apparent by the failure to relate the overtime rate to situations in which unusually long hours were in fact worked. Thus, when two tours were worked in a day, the employee was paid the tour wage twice and not the contract "regular" rate for 4 hours and time and one-half for the 12 hours in excess of 4.

The Government does not argue that genuine overtime premium rates may not be paid on a daily basis for work beyond the normal workday. Such

[33] The trial court found that "The underlying purpose and the practical effect of these respective wage plans effective prior to July 15, 1941, were to maintain employees' wages as [at] same level as before the Act went into effect" (Finding of Fact No. IV, R. 74).

overtime pay would not raise the regular rate and the employer would be entitled to credit it against the weekly overtime compensation which would be due under Section 7 for work beyond 40 hours. For example, an employee who customarily works an 8-hour day at $1.00 an hour may under his employment contract be paid time and one-half for daily hours beyond 8. If he works 12 hours on the first day of the workweek, the $6.00 which he gets for the 4 hours of overtime on that day do not affect his regular rate of pay which remains $1.00 an hour. Should he work 44 hours in that week, the Act would require the payment of $46.00 (40 hours at $1.00 plus 4 hours at $1.50). He would, however, receive the same amount by reason of the daily overtime, and the Act would require no additional payment.[34]

Respondent's split-day method of payment is outside this principle, however. The specified payment for "overtime" was for work within the regular workday, for the 8-hour tour was the normal day-to-day work schedule both before and after the passage of the Act. As has already been shown, when an abnormally long day em-

[34] "Extra compensation paid for overtime work need not be included in determining the employee's regular hourly rate of pay." Par. 13, Wage and Hour Division Interpretative Bulletin No. 4, originally issued November 1938, reissued, revised, and supplemented December 1939, July 1940, and November 194. See also Pars. 70 (3) and 70 (4), distinguishing between cases of genuine daily overtime and arrangements like the contracts in issue here.

bracing genuine overtime was worked, the employee did not get the time and one-half rate for all hours worked beyond 4; when he worked two tours or 16 hours in one day, he did not receive 150 percent of the "base rate" for 12 hours. He was paid the same rate for each tour, or two days' pay for two days' work, and not the higher rate of pay for the extra work. Respondent cannot contend that the contract in such a case, since it allowed 8 hours of "overtime" pay, allocated this increased compensation to the last 8 of the 16 hours worked, because by the contract the employee was entitled to 4 hours of overtime pay when he completed the first tour.

To permit such devices to succeed is to put the policy of overtime compensation for overtime work at the mercy of "lawyer's ingenuity" (*Griffiths* v. *Commissioner*, 308 U. S. 355, 357), and to ignore this Court's admonition against construing the Fair Labor Standards Act "in a narrow, grudging manner." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local et al.*, 321 U. S. 590, 597. Section 7 would lose its vitality as an instrument to carry out the legislative purpose of making a long workweek more costly to the employer and more remunerative to the employee. Daily and weekly wages could then be retained unchanged and longer workweeks worked without added compensation. Employers need only devise appropriate mathematical formulas specifying ar-

bitrary "regular" rates such that the normal weekly or daily wage would cover time and one-half for overtime hours beyond the longest work-weeks actually in use. Cf. *Valentine* v. *Christensen*, 316 U. S. 52, 55. It is unnecessary for us to employ the "familiar dialectic" of suggesting extreme cases. The reality of the danger is evidenced by the instant case itself and also by variations of the Poxon plan actually used by certain mining companies.[35] In one such case the first hour of each week or month was designated by the contracts to be paid for at the specified "regular" rate. All the remaining hours worked in the week or month were paid for at the "overtime" rate of time and one-half. *Walling* v. *Arctic Circle Exploration Co.*, 7 Wage Hour Rept. 364 (W. D., Wash., 1944). See also *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 7 Wage Hour Rept. 367 (W. D., Wash., 1944).

That the parties have contracted to regard the specified rate as the "regular" rate when it is not

[35] Even respondent with respect to watchmen whose normal workday was 12 hours designated only 5 of them as "regular" and 7 as "overtime." The disingenuousness of respondent's employment contracts is shown by the use of the "X Plan" at least through the date of the trial with respect to lease pumpers working irregular workdays and workweeks (R. 95). See note 11, *supra*, p. 11. In such cases the Poxon plan was apparently not feasible and the algebraic equation for ascertainment of the regular rate was used. The plan was upheld by the District Court but this part of the judgment was reversed by the Circuit Court of Appeals (R. 117-119).

so in fact cannot control the operation of Section 7[36] unless it be held that employees may waive their rights under the Act. This of course they may not do. *Missel* case, *supra*, p. 577. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603; *D & L Production Co.* v. *Cuniff*, 165 S. W. (2d) 933 (Tex. Civ. App.) (1942). Compliance with the statute cannot be made a matter of private choice. Remedial statutes in the public interest (see *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364), including wage-and-hour statutes, are not to be waived or avoided by private agreement. *United States* v. *Morley Construction Co.*, 98 F. (2d) 781, 789 (C. C. A. 2), certiorari denied *sub nom. Maryland Casualty Co.* v. *United States*, 305 U. S. 651; *Larsen* v. *Rice*, 100 Wash. 642 (1918); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622, 626 (C. C. A. 7). The contracts involved in the present case are nothing more than attempts to write such a waiver in different verbiage. They continue unchanged a daily wage, antedating the Act, which was therefore unconcerned with the

[36] It may seem trite to call the Court's attention to its many admonitions, notably in the tax field, that in measuring compliance with statutory requirements its concern is not with the form in which the parties clothe their actions but with the substance of what they have done. A different course would "exalt artifice above reality and * * * deprive the statutory provision * * * of all serious purpose." *Gregory* v. *Helvering*, 293 U. S. 465, 470. See also *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613; *Higgins* v. *Smith*, 308 U. S. 473, 477.

weekly hours worked, and made no provision for extra compensation for weekly overtime. There was added only the "technically elegant arrangement" (*Griffiths* v. *Commissioner*, 308 U. S. 355, 357) of the contract, by which the wages "'are attributed to a different tree from that on which they grew.' *Lucas* v. *Earl*, 281 U. S. 111, 115" (*id.*, p. 358).

We believe we have already demonstrated that respondent's contracts do not conform to the letter of Section 7. In the words of Mr. Justice Holmes, moreover, respondent's plan must be "condemned as an evasion" because "it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." *Bullen* v. *Wisconsin*, 240 U. S. 625, 630–631.

C. *The decision in the Belo case does not support the validity of respondent's method of payment.*—Respondent relies upon *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, to sustain the validity of its plan, and both lower courts upheld the contracts in question on the authority of that decision. We submit that this is the result of a misunderstanding of the *Belo* case.

The employment contracts in the *Belo* case were different. In that case the agreement fixed a regular hourly rate and provided that the employees were to receive not less than time and a half for every hour of overtime work beyond the maximum hours fixed by the Act (p. 634). Weekly salaries were at the same time guaranteed.

This Court concluded that the hourly rate specified was in fact one of two actual bases for the employee's compensation; for when more than 54½ hours* were worked in a week, the guaranteed sum became inadequate to cover the overtime and the employee was entitled to extra compensation which he was paid. The Government's contention that the specified hourly regular rate was fictitious was therefore rejected.

The weekly guaranty was held by this Court not to negative compliance with Section 7 even though the employees did not always work enough hours to earn it at the specified hourly rate for the first 40 hours and time and one-half for hours over 40, since the contracts provided a higher overtime rate in such instances. The Court pointed out that the contracts, like Section 7, provided that "not less than" one and one-half times the regular rate would be paid; and the excess which the guaranteed weekly salary provided in overtime weeks of less than 54½ hours was viewed as simply an additional premium for overtime. This Court emphasized that the Circuit Court of Appeals had "found that the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rate at which each employee was employed'" (pp. 629–630). Hence the contracts were found to ful-

* When the statutory workweek was 44 hours; 53 hours when it was reduced to 40 hours in 1940.

fill the Congressional purpose of providing an increased rate of at least time and one-half "for every hour of overtime work beyond the maximum hours fixed by the Act" (p. 634).

In the instant case, by contrast, the "regular" hourly rate specified did not, as has been shown, have any demonstrable effect in determining the employee's weekly compensation. The fixed *daily* wage which was the achieved aim of respondent's contracts was invariable whatever the length of the workweek. There was no burden to the employer and no premium to the employee in workweeks of whatever length. Respondent's employees working 8-hour tours would have had to work 25 hours longer than their customary workweeks and more than double the statutory maximum workweek to become entitled under the contracts to more than their normal compensation. Such hours were never worked and this purely theoretical possibility[38] of receiving additional compensation has no more significance than the fact

[38] The Circuit Court of Appeals in the instant case found the provision in the "X" contract for payment of not less than the minimum straight time wage of $0.30 an hour and $0.45 for overtime hours after 40 insufficient to save that contract from invalidity. "* * * that provision has no practical operative effect whatever because in order to earn more than the stipulated weekly wage the employee would be obliged to work unreasonably long hours—far in excess of the hours which the parties could reasonably have contemplated" (R. 118–119). And yet the lease pumper, Farrar, under his "X" contract (R. 53–55) would have had to work only a few hours longer to be entitled to more than his stipulated weekly wage of $38.93 than would the watch-

in the *Missel* case that the weekly wage would have become inadequate to yield the statutory minimum overtime rate of $0.45 for additional overtime hours at some point in the workweek and that further payments would then have become necessary.[39] 319 U. S. 572, 574–575.

The Belo decision determined a "close" question presented by contracts designed to meet the "special problems" of providing the "security of a regular weekly income" to employees in a business which necessarily involved workhours which "fluctuate from week to week", 316 U. S. at p. 635. The decision cannot be stretched to approve an arrangement which for all its "technical elegance" simply perpetuates the payment of a fixed daily wage for a fixed workday, without any provision for weekly overtime work.

Certainly the Belo decision is not to be regarded as announcing the doctrine applied by the court below (R. 116–117) that the parties may fix by contract any rate they choose as the regular rate upon which the overtime rate is to be com-

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man or swamper working a 12-hour tour under their split-day contracts (R. 31). The latter would theoretically be entitled to additional compensation after 96 hours a week; Farrar after 99. In both cases the obligation to pay the additional sums was illusory. Certainly neither Farrar nor the watchman looked forward to the prospect of additional compensation as a perquisite of his job.

[39] The $27.50 weekly salary involved in the *Missel* case was adequate to cover the $0.30 straight-time minimum rate and a $0.45 overtime rate for approximately 74 hours under a 40-hour statutory maximum workweek.

puted, regardless of its relationship to the employer's wage cost.[40] A court must surely examine beyond the parties' assertion of what the regular

[40] There has been no agreement among the inferior courts in their interpretation and application of the *Belo* case. Some, like the court below, have regarded Section 7 as complied with if there is a "regular rate" stipulated in the contract of employment even though a different rate in fact was paid. *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub. nom. Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944). Other courts have refused to apply the Belo decision to situations in which the stipulated rates are not controlling because they bear no reasonable relation to the wages paid. *Walling* v. *L. J. Mueller Furnace Co.*, 50 F. Supp. 561 (E. D. Wis); *Welling* v. *Highway Express, Inc.*, 6 Wage Hour Rept. 363, 364 (W. D. Tenn. 1943); *Walling* v. *Fischer Lime & Cement Co.*, 7 Wage Hour Rept. 624 (W. D. Tenn. 1944); *Wilks* v. *Phillips & Buttorff Mfg. Co.*, 7 Wage Hour Rept. 832, 835 (Tenn. Ct. of App. 1944).

Other courts have thought that the guaranty of a weekly salary is an essential feature of any contract if it is to meet the test of the Belo decision. In the instant case the court below approved the Poxon plan although it provided no weekly guaranty, notwithstanding the fact that in *Walling* v. *Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10), the same court seemed to rely upon the absence of such a provision as a ground for distinguishing the Belo contract from the contract before it.

See also *Scott* v. *Atlas Press Co.*, 49 F. Supp. 260 (W. D. Mich.); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Loftin*,

rate is. And while it is true that rates of pay, which determine wage costs, are the result of consensual arrangements between employer and employee, full freedom to contract as to what rate shall be regarded as the "regular rate" for the purpose of calculating overtime under Section 7 cannot be postulated without defeating the legislative purpose. The basic plan of this Section was to restrict freedom of contract with respect to wages for hours above the maximum. *United States* v. *Darby*, 312 U. S. 100, 125. No contract has validity which "falls short" of the "basic policy" of Section 7. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603.

Section 7 (b) of the Act relaxes the requirements of Section 7 (a) in return for a uniform wage upon an annual basis only when such an arrangement is "made as a result of collective bargaining by representatives of employees certified as *bona fide* by the National Labor Relations Board" and the annual hours are limited to an average of not more than 40 each week and the hours in any one week to 56.[41] The careful limita-

136 F. (2d) 359 (C. C. A. 10), certiorari denied, 320 U. S. 772; *Murray* v. *Noblesville Milling Co.*, 131 F. (2d) 470 (C. C. A. 7), certiorari denied, 318 U. S. 775, for other interpretations of the Belo decision.

[41] Section 7 (b), 52 Stat. 1063, 29 U. S. C. sec. 207 (b) as amended by the Act of October 29, 1941, 55 Stat. 756, 29 U. S. C. sec. 207 (b), Supp. III, provides:

"No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in

tion which Congress imposed upon this contractual method by which the requirements of Section 7 (a) could be superseded [42] is a strong indication of the restricted area in which Congress intended variations by private contract to operate.[43]

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excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—* * * *

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks,

"* * * if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

[42] "Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Section 7 (b) (1) and (2) of the Act. Cf. Section 8 (c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603, n. 18.

[43] Under Section 7 (b) (2), as amended, an employee pursuant to a collective bargaining agreement may work only 2,080 hours a year and not over 56 hours a week or 12 hours a day. Under respondent's contracts an employee on an 8-hour tour may work 4,160 hours a year (80 × 52 weeks) without additional compensation, and an employee on a 12-hour tour may work 4,992 (96 × 52 weeks).

If parties may by contract stipulate a regular rate unrelated to the facts of the employ nent arrangement, then the only limits to the pe missible schemes for avoiding Section 7 will be hose imposed by the limitations of ingenuity. And the principal victims of evasive schemes will be unorganized employees, the very workers this court has often recognized to be most in need of statutory protection—the workers for whom the Fair Labor Standards Act was primarily designed.

CONCLUSION

The decision below should be reversed and the cause remanded for further proceedings.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
IRVING J. LEVY,
RALPH F. FUCHS,
Department of Justice.

DOUGLAS B. MAGGS,
Solicitor.
HARRY M. LEET,
Attorney,
United States Department of Labor.

SEPTEMBER 1944.

APPENDIX A

[EXHIBIT C, R. 31]

Employment Contract No. 529

1B

Date: Sept. 4, 1940.

Place: Salem, Ill.

HELMERICH & PAYNE, INC.,
415 Philtower, Tulsa, Oklahoma.

GENTLEMEN: I hereby accept employment with you as a Rotary Helper upon the following wage scale and conditions, to wit:

The base or regular rate per hour for employees coming under classifications 1, 2, 3, 4, 5, 6, 7 and 10 below shall be paid for the first 4 hours in each 8-hour tour and hours (in each said 8-hour tour) in excess of the 4 shall be paid for at 1½ times said base or regular rate.

The base or regular rate per hour for employees under classifications 9, 11 and 12 below shall be paid for the first 5 hours in each 12-hour tour and hours (in each said 12-hour tour) in excess of the 5 shall be paid at 1½ times base or regular rate.

The base or regular rate per hour for employees under classification 8 noted below shall be paid for the first 5 hours in each 10-hour tour and hours (in each said 10-hour tour) in excess of the 5 shall be paid for at 1½ times base or regular rate.

In event each monthly compensation of any employee of the following classifications:

Lease Pumpers (classification No. 8)	$130.00
Truck Drivers (classification No. 11)	165.00
Swampers (classification No. 12)	150.00

does not equal the sum hereinabove set opposite the same, the Company will advance said employee the difference which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases.

Base or regular hourly rates are as follows:

Classification	
1. Rotary Driller	$1.10
2. Rotary Helpers	.70
3. Cable Driller	1.00
4. Tool Dresser	.80
5. Mechanics	.70
6. Roustabouts (in Kansas and Texas)	.48
7. Water Pumpers	.45
8. Lease Pumpers	.34
9. Watchmen	.30
10. Roustabouts (in Oklahoma and Illinois)	.50
11. Truck Drivers	.35
12. Swampers	.32

Base rate shall never apply to more than 40 hours in any work week.

I agree to make daily reports to your home office at 415 Philtower, Tulsa, Oklahoma, of all my work time while in your employ.

It is understood that you may terminate my employment at any time either with or without cause and either with or without notice as you may in your uncontrollable discretion, from time to time determine.

W. E. BECHTEL,
Employee.

Witnesseth:

CHAS. STALEY,
Company's Representative. (2-E)

APPENDIX B

1. State statutes and regulations prescribing overtime pay by reference to a multiple of the "regular" or "normal" rate or similar base:

Colo. Laws 1937, c. 113, sec. 4 (a), (c) ("one and one-third times the normal rate"); Order No. 2, for Retail Trade Occupations ("one and one-half times the regular hourly rate"); Nev. Compiled Laws, par. 2825.42 ("time and one-half for each said additional hour, computed on their regular wage rates"); N. Car. Gen. Stat. (1943) par. 95–17 ("one and one-half times the usual compensation for all hours worked over fifty-six); Okla. Stats. (1940), tit. 40, par. 82 ("double their regular compensation for such extra time"); Ore. Comp. L. Ann. (1940), sec. 102–502 ("time and one-half the regular wage"); Orders No. 7 and 12 (1941) Wage Hour Comm. ("time and one-half her regular rate of pay" and "the regular hours"); Regulations pursuant to Pa. Stat. (Purdon 1941), tit. 43, sec. 103, Governing the Mail Order Industry and Retail Trade, Pennsylvania Department of Labor and Industry, 1942, p. 11 ("the rate of one and one-half times the regular rate per hour"); S. Car. Acts 1937, No. 326, sec. 1, as amended Acts 1939, No. 204 (Sunday work, "on the basis of one and one-half the amount of the usual average day wage or salary earned by such employee during other days of the week"); Acts

1938, No. 943, sec. 2 (c) ("the said employer shall pay the employee for all overtime at the rate of one and one-half the regular wages"); Tex. Stat. (Vernon 1936), art. 5169, 5170, ("rate of double her regular pay for such time as she is employed for more than nine hours per day"); Washington, Rev. Stat. (Remington 1932) sec. 7643 ("one and one-half times the rate of pay allowed for the same amount of time during eight hours' service"); Wis. Stat. (1943), sec. 103.02 ("one and one-half times the regular rates"), sec. 103.50 ("1½ times his hourly rate of pay"); Ore. Comp. L. Ann. (1940), sec. 102–323 ("time and a half for time over ten hours per day when employed in canneries or driers or packing plants * * * piece workers shall be paid one and a half the regular prices for all work done during the time they are employed over ten hours per day").

2. State statutes containing expression "time and one-half" as self-explanatory:

Ariz. Code Ann. (1939), sec. 56–101 (a) ("time and one-half for all time in excess of eight hours"); Ark. Stat. (Crawf. & M. Dig. 1921, sec. 7109 ("at the rate of time and one-half for hours worked in excess of nine hours"); N. Mex. Stat. (Supp. 1938), sec. 80–207 as amended, Laws 1939, c. 196, seg. 7; sec. 80–502, 80–504 ("labor in excess of forty-eight hours * * * shall be paid for on the basis of time and one-half for such excess"); Ore. Laws 1937, c. 360 ("double pay for the overtime so employed"); Wyo. Rev. Stat. (1931) sec. 63–113 ("time and a half for each and every hour of overtime in any one day").

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No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This reply brief is submitted because of a statement on page 4 of respondent's brief concerning a "fact" on which "the record is silent". Respondent says:

> The record is silent as to the reason for this abandonment [of the split-day plan], although, as a matter of fact, it was done because of an arrangement (initiated by respondent) between the American Association of Oil Well Drilling Contractors (of which respondent was a member) and

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> Philip B. Fleming, Administrator of the Wage and Hour Division of the Department of Labor, by which the members of said association signified their intention to abandon the use of employment contracts similar to the one in issue. * * *

Although this asserted reason for the voluntary discontinuance by respondent of the Poxon contracts would not appear to be relevant to the issue of mootness, the facts concerning the so-called "arrangement", together with relevant subsequent correspondence, are set forth briefly here for the convenience of the Court, since they are not in the record.

It appears from the material which follows (1) that the arrangement referred to was not to affect pending suits and in particular was not to affect the instant action; (2) that there was no agreement that the parties would not revert to the split-day contracts if their validity was sustained in such suits, and (3) that the arrangement did not eliminate the controversy between the parties because the respondent continued to contend that its contracts were legal and that it should therefore be free to resume their use.

The arrangement to which respondent refers is set forth in an exchange of letters between the American Association of Oil Well Drilling Contractors and the Administrator of the Wage and Hour Division. The Association by letter dated July 7, 1941, on behalf of its members "pro-

pose[d] to comply with the Act beginning July 15, 1941", as interpreted by the Administrator with respect to several points specified by the letter. The proposal involved, among other things, the discontinuance of the split-day agreements and the payment of an hourly rate and time and one-half that rate for all hours worked each week in excess of 40. The relevant portions of the letter follow:

JULY 7, 1941

General PHILIP B. FLEMING
Administrator, Wage and Hour Division
United States Department of Labor,
Washington, D. C.

DEAR GENERAL FLEMING: Pursuant to the arrangement made with you at the meeting in your office on June 20, 1941, between representatives of leading oil well drilling contractors and you and your associates, we have with your approval formulated this arrangement which has been presented to and approved by representatives of 300 oil well drilling contracting companies or individuals operating 1,252 drilling rigs.

Enclosed herewith is a list of such companies which show the number of rigs operated by each, and all those listed have authorized me to execute this letter in their behalf. The industry understands there is no objection under the law to an employer reclassifying or recontracting with employees now on a wage or salary basis so as

to put them on an hourly basis, and no objection to hiring new employees on an hourly basis so long as the hourly rates are not fixed below the minimum provided in the Act and new rates are established in good faith and strictly adhered to and the employees are paid time and one-half for all hours worked each week in excess of 40. This ability to reclassify or re-contract shall extend to agreement with existing employees relating to new or additional employment to be performed by them. The industry further understands that you consider it a violation of the Act for an employer to adopt the so-called "6–2" plan or any other similar plan whereunder the regular workday of 8 hours is divided into a certain number of straight time hours and a certain number of overtime hours. The industry also understands that the Wage and Hour Division has characterized the so-called "6–2" and other similar plans as fictitious bookkeeping devices which violate the Act.

* * * * * *

On the basis of the foregoing understandings, the members of the industry represented herein, including those already complying with the Act, propose to comply with the Act beginning July 15, 1941.

It is further understood that, excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations oc-

curring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942.

The industry further understands that with the exceptions noted in the preceding paragraph, you will not recommend or institute legal action based solely upon violations occurring before July 15, 1941, nor will you require any member of the industry represented herein to make restitution of wages for any claimed violations of the act prior to July 15, 1941, unless such member shall be found to be in violation after July 15, 1941, in which case you reserve the right to enforce compliance with the Act since its effective date against any employer who shall not comply with the Act after July 15, 1941, in accordance with the above understandings.

It is of course understood that in the event of any employee suits brought against members of the industry, the Division may feel itself obliged to intervene if questions of coverage or other legal issues are raised.

I shall appreciate it if you will acknowledge this letter and confirm the arrangement herein set forth.

Yours very truly,

[s] BRAD MILLS

Brad Mills,

Secretary American Association of Oil Well Drilling Contractors

1820 Republic Bank Building

Dallas, Texas

On July 26, 1941, the Administrator replied confirming "with slight modification" the understanding set forth in the Association's letter of July 7, 1941. The qualification was to remove any limitation on the number of suits which the Administrator might feel it necessary to bring against oil well drilling contractors for violations occurring before July 15, 1941. The relevant portion of the Administrator's letter follows:

> This letter will confirm, with slight modifications, hereinafter noted, the understanding set forth in your letter of July 7.
>
> * * * * * *
>
> In the third full paragraph of page 3 of your letter you state that you understand that "excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations occurring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942." While we are not certain of the number of suits which may be instituted against oil well drilling contractors, we would prefer not to be limited to the bringing of "two or three" such suits. It may be that no more than two or three suits actually will be instituted but we prefer not to be restricted so specifically in the number of suits which may be brought. With this understanding, the paragraph of

the letter in question will be understood to read as though the words "two or three" were deleted therefrom.

In all other respects, I agree with the understanding set forth in your letter of July 7.

It will be noted that both parties understood that the arrangement was not to affect pending suits. It will also be noted that there was no understanding that the employers would not revert to the split-day contracts if their validity was sustained in such suits. The specific undertaking was "to comply with the Act beginning July 15, 1941" (*supra*, p. 4).

On August 5, 1941, respondent's counsel wrote to the Administrator suggesting that the pending action be discontinued. That letter is as follows:

SETTLE, MONNET & CLAMMER
TULSA, OKLAHOMA

AUGUST 5, 1941

Re: *Philip B. Fleming, Admr., of the Wage and Hour Division, plaintiff*, vs. *Helmerich & Payne, Inc., Defendant*, No. 568 Civil, U. S. District Court, Northern District of Oklahoma

General Philip B. Fleming
Administrator Wage and Hour Division United States Department of Labor, Washington, D. C.

DEAR GENERAL FLEMING: The above indicated action was an action filed May 3, 1941, which sought to enjoin the defendant,

Helmerich & Payne, Inc., a drilling contractor with headquarters in Tulsa, Oklahoma, from paying wages to its employees in the manner provided in its contract with said employees on the grounds that same violated the Fair Labor Standards Act.

This company was paying wages under written contracts with each of its employees on what we term a daily division of regular time and over-time. That is, most of its employees work on what are called "towers" of eight hours each. Each tower was divided into two equal parts, the first four hours being paid at regular hourly rate and the second four hours at time and a half. On a 56 hour week this resulted in 28 hours being paid at regular time and 28 hours at time and a half.

Since that time the Association of Drilling Contractors has entered into an arrangement with your office by which they are paying their men various regular rates in excess of the minimum for the first 40 hours of each week and time and a half thereafter, and your office has indicated that if this was done you would, in most instances, overlook any prior irregularities.

Helmerich & Payne, Inc., was not only one of the contractors in this group, but was the original contractor who, at the suggestion of your local representative, Mr. Jas. P. Crowe, initiated the association of these contractors for this purpose. This company has changed its system of paying

its employees as above indicated and we are wondering if you consider it necessary to continue the prosecution of the above indicated action, which really now involves a moot question.

We would appreciate it if you would let us know at your early convenience your disposition in regard to this matter.

Yours respectfully,

SETTLE, MONNET & CLAMMER

By /s/ EUGENE O. MONNET

* * * * *

On August 13, 1941, the Administrator replied as follows:

AUGUST 13, 1941

EUGENE O. MONNET, Esquire
Settle, Monnet & Clammer
Suit 1001 Philtower Building
Tulsa, Oklahoma

Re: *Fleming* v. *Helmerich & Payne, Inc.*

DEAR MR. MONNET: We acknowledge receipt of your letter of August 5, 1941, with reference to the above-entitled action.

In your letter you state that, since Helmerich & Payne, Inc., was one of the original contract oil diggers who initiated the plan of compliance whereby the Association of Drilling Contractors entered into a compliance arrangement with the Wage and Hour Division, and since the company has now changed its system of paying its employees, and the questions involved in the above-entitled action are moot, you wonder

whether we feel it is necessary to continue the prosecution of said action.

In our letter of July 26, 1941, to Mr. Brad Mills, Secretary, American Association of Oil Well Drilling Contractors, we specifically stated:

"In the third full paragraph of page 3 of your letter you state that you understand that 'excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations occurring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942.' While we are not certain of the number of suits which may be instituted against oil well drilling contractors, we would prefer not to be limited to the bringing of 'two or three' such suits. It may be that no more than two or three suits actually will be instituted but we prefer not to be restricted so specifically in the number of suits which may be brought. With this understanding, the paragraph of the letter in question will be understood to read as though the words 'two or three' were deleted therefrom."

Our complaint was filed against Helmerich & Payne, Inc., on May 3, 1941, two months before the compliance arrangement was entered into. By the terms of our letter of July 26, 1941, the arrangement

does not apply to this company. Consequently, we see no reason why our complaint should be dismissed.

Sincerely yours,

PHILIP B. FLEMING
Administrator.

On August 15, 1941, counsel for respondent replied to the Administrator's letter:

SETTLE, MONNET & CLAMMER
TULSA, OKLAHOMA

AUGUST 15, 1941

Re: *Philip B. Fleming, Admr., of the Wage and Hour Division, Plaintiff,* vs. *Helmerich & Payne, Inc., Defendant,* No. 568 Civil, U. S. District Court Northern District of Oklahoma

General PHILIP B. FLEMING
Administrator Wage and Hour Division
United States Department of Labor,
Washington, D. C.

DEAR GENERAL FLEMING: I acknowledge receipt of your letter of August 13th in regard to above indicated matter and have carefully noted the contents of the same.

My letter apparently did not convey the impression to you that I intended. Neither myself nor my clients believe or contend that your office is in any way obligated under the recent arrangement with the Drilling Contractors' Association to dismiss this action. I merely wished to convey the thought that since the action was brought

to enjoin the defendant from paying wages upon a basis which defendant is no longer using, that the action was moot and no useful purpose could be complished in continuing the action, however, we have always been of the opinion that the method we used did not violate the Fair Labor Standards Act and will be very glad to test the legality of this method.

Yours respectfully,

SETTLE, MONNET & CLAMMER

By [s] EUGENE O. MONNET

Reference has already been made to the subsequent letter of respondent's counsel to the District Court Judge admitting that the action was not moot (Pet. Brief, p. 18, n. 14). Attention has also been directed to the fact that two of the three wage agreements substituted in July 1941 for the split-day contracts were assailed by the Administrator at the trial of this action as not being in compliance with the overtime requirements of the Act, and one of them, the "X" plan, was enjoined by the court below. See Petitioner's Brief, pp. 10–11, notes 10 and 11. The arrangement to which petitioner refers clearly contemplated that payment was to be on a straight hourly basis plus time and a half for each hour worked beyond 40.

We respectfully submit that the foregoing arrangement and the subsequent correspondence of the parties do not support the contention that the

present case is moot but, rather, point to the contrary conclusion.

CHARLES FAHY,
Solicitor General.
IRVING J. LEVY,
RALPH F. FUCHS,
Department of Justice.

DOUGLAS B. MAGGS,
Solicitor.
HARRY M. LEET,
Attorney,
United States Department of Labor.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944

FILE COPY

No. 27

In the Supreme Court of the United States

October Term, 1944.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, *Petitioner,*

vs.

HELMERICH & PAYNE, INC., *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENT.

FRANK SETTLE,
EUGENE O. MONNET,
SAM CLAMMER,
918 Philtower,
Tulsa, Oklahoma,
Attorneys for Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1944.

No. 27

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, *Petitioner,*

vs.

HELMERICH & PAYNE, INC., *Respondent.*

BRIEF *for the* RESPONDENT.

Statement.

This action involves the validity (under the Fair Labor Standards Act) of a certain employment contract (R. 76) of respondent, a drilling contractor and oil producer. Petitioner, the Administrator of the Wage and Hour Division of the United States Department of Labor, seeks to enjoin respondent's use of this contract, which was abandoned on and has not been used since July 16, 1941 (R. 10 and 19), two months after suit was filed in the lower court and long prior to the judgment of that court. The lower court found the contract complied with the Act, and on December 4, 1942, rendered judgment denying the injunction (R. 83). Petitioner appealed to the United States Circuit Court of Appeals for the Tenth Circuit, which court affirmed said judgment on November 15, 1943.

Prior to the effective date of said Fair Labor Standards Act (October 24, 1938) respondent, like most other employers in the oil industry, was paying wages far in excess of the required minimum rate under the Act. For instance, it was paying its rotary drillers $11.00 an eight hour day or tour, and its rotary helpers $7.00 for the same period. Consequently, upon passage of the Act, respondent was not confronted with the necessity of raising its wages to conform thereunto, but merely in changing its employment agreements to conform with the meaning and purpose of this new, unusual and then uninterpreted Act.

> *Its main purpose in formulating a new employment agreement was to permit, as far as possible, the payment of the same weekly wage after the Act as before;*

and this to enable its employees to have the same regular weekly income as they had before passage of the Act. Respondent decided that this new contract should provide for payment to its employees of the base or regular hourly rate for one half of the hours worked in each work week (not to exceed the maximum required by the Act); and of the overtime rate (one and one-half times base rate) for the remaining one-half of said work time in each work week. Upon this basis regular hourly rates were determined, which would insure to its employees at least the same weekly wage they had been receiving before the Act became effective. Forms were printed on this new contract, which was then signed in triplicate by the respondent (employer) and each of its field employees, who each received an executed copy thereof.

This contract, which petitioner chooses to call "Split Day Plan Contract," but which we believe would be more

appropriate to term "Split Week Plan Contract" contained the following provisions, to-wit:

1. Provided for a specific fixed and stated regular or base hourly rate of pay, which was far in excess of the statutory minimum, being $1.10 per hour in case of a rotary driller, seventy cents per hour in case of a rotary helper, $1.00 per hour in case of a cable tool driller, and eighty cents per hour in case of a tool-dresser;

2. Provided for payment of the regular or base hourly rate for the first four hours in every work day or eight hour tour, and one and one-half times said regular or base hourly rate for the last four hours in each said tour;

3. Provided that the regular or base hourly rate should never apply to more than forty hours in any work week;

4. Provided that as to lease pumpers, truck drivers and swampers, that in event employee's pay for any bi-weekly period was less than a stipulated amount, that employer would advance said employee the difference, which shall apply on future overtime payments; adjustment to be made on January 1st of each year and when said employment ceases; and

5. Provided that employee should make daily reports to the Home Office of all his work time.

ARGUMENT.

The order of this court allowing the writ of *certiorari* (R. 121) specifically requested counsel "to discuss in their briefs and oral argument the question of whether the case is moot." This, therefore, raises two main issues to be considered on this appeal, namely:

First: *Is this a moot case, which should be dismissed;* and

Second: *Was said employment contract of the respondent in violation of Section 7 of the Fair Labor Standards Act.*

These questions will be hereinafter discussed in the order above set forth, which is in the same order used by petitioner in its brief.

I.

Is This a Moot Action, Which Should Be Dismissed?

This injunction action was filed in the lower court on May 3, 1941. Respondent voluntarily abandoned the employment contract complained of on July 16, 1941, less than 2½ months thereafter. The record is silent as to the reason for this abandonment, although, as a matter of fact, it was done because of an arrangement (initiated by respondent) between the American Association of Oil Well Drilling Contractors (of which respondent was a member) and Philip B. Fleming, Administrator of the Wage and Hour Division of the Department of Labor, by which the members of said association signified their intention to abandon the use of employment contracts similar to the one in issue. The record further shows that respondent successfully maintained the validity of this contract through the lower court and Circuit Court of Appeals. This court will take judicial notice of the fact that under the Federal Anti-Inflation Act and the President's Executive Order effectuating the same, respondent could not now change its present employment contracts and go back to the use of the contract under attack without the approval of the War Labor Board.

Under Article 3, Section 2 of the Federal Constitution, Federal courts have jurisdiction to hear and determine "cases and controversies" only. A moot question does not present a "case" or "controversy" and, consequently, being a jurisdictional question, the power of the court to hear and determine a moot case cannot be conferred thereon by waiver or consent of the parties.

See *People of the State of California* v. *San Pablo & T. R. Co.*, (1893) 149 U. S. 308, 13 Sup. Ct. Rep. 876; *United States* v. *Hamburg-American Co.*, (1916) 239 U. S. 466, 36 Sup. Ct. Rep. 212, wherein it was stated:

> "No stipulation of the parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard."

This court has held that:

> "It is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where, by an act of the parties or subsequent law the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law that cannot affect the result as to the thing in issue in the case before it."
>
> *United States* v. *Alaska S. S. Co.*, (1920) 253 U. S. 113, 40 Sup. Ct. Rep. 448 at 449.

See also *United States* v. *Hamburg-American Co.*, (1916) 239 U. S. 466, 36 Sup. Ct. Rep. 212; and *People of the State*

of California v. San Pablo & T. R. Co., (1893) 149 U. S. 308, 13 Sup. Ct. Rep. 876; *Walling v. Shenandoah-Dives Mining Co.*, (C. C. A. 10, 1943) 134 F. (2d) 395; wherein the Circuit Court dismissed, as moot, an injunction suit under circumstances very similar to the case at bar.

It was the duty of the Administrator of the Wage and Hour Division of the Department of Labor to see that the Act was complied with and he was thereby specifically given the right to enjoin its violation. When violations of this Act cease, either because of warnings from the Administrator, or injunctions secured by him, his duty has been performed. In this case respondent ceased the alleged violation shortly after suit was filed and long before trial. At the time of trial and judgment of the lower court it was neither doing nor threatening to do any act in violation of the statute.

An analysis of petitioner's brief discloses the following grounds to support its contention that this case is not moot and is still a controversy, to-wit:

First, Administrator's desire and need for a judicial construction of this type of contract;

Second, Lack of affirmative showing that respondent would not again use the abandoned employment contract; and

Third, Respondent's successful maintainance of the legality of said contract in the two courts below.

In support of this contention it cites:

Hecht Co. v. Bowles, (1944) 321 U. S. 321, 64 Sup. Ct. Rep. 587;

J. I. Case Co. v. Natl. Labor Relations Board, (1944) 321 U. S. 332, 64 Sup. Ct. Rep. 576;

Federal Trade Commission v. Goodyear Tire &

Rubber Co., (1938) 304 U. S. 257, 58 Sup. Ct. Rep. 863;

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, (1938) 303 U. S. 261, 58 Sup. Ct. Rep. 571;

United States v. *Trans Missouri Freight Asso.*, (1897) 166 U. S. 290, 17 Sup. Ct. Rep. 540;

all of which cases are determined either by special statutes, involve the validity of then present, existing desist orders, or seek to enjoin actually threatened unlawful acts; and do not, in our opinion, sustain petitioner's contention. The *Hecht* case was determined by special section of the Emergency Price Control Act of 1942, which specifically gives the Price Administrator the right to enjoin violations of that Act upon a showing that any person has violated the same regardless of subsequent cessation of said violation; the *J. I. Case Company* case involved the validity of then present, existing desist order of the National Labor Relations Board; the *Federal Trade Commission* v. *Goodyear* case also involved the validity of a then present, existing desist order of the Federal Trade Commission, which the court held was none the less effective and existent, though subsequently complied with; the *National Labor Relations Board* v. *Pa. Greyhound* case also involved the validity of a then present, existing desist order of the National Labor Relations Board, which, in the following language was held to still be an active order, though obeyed:

> "That an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

In other words, an injunction is not dissolved by complying with it.

The *United States v. Trans-Missouri Freight Association* case was a case wherein the government sought to dissolve an association of railroad companies and enjoin their compliance with the contract of association, alleged to be in violation of the Anti Trust Act. The lower court refused to grant the injunction upholding the association contract and the government appealed to the Circuit Court. Between the lower court's judgment and the decision of the Circuit Court, the railroads voluntarily dissolved the association and the contract creating it, but almost immediately thereafter entered into a new and similar association contract. The Circuit Court affirmed the judgment of the lower court and the government appealed to this court. Whereupon, the defendant moved to dismiss the appeal on the grounds the case was moot, setting forth the fact of the dissolution of the association and the association contract. The government filed counter affidavits, showing that while the association had been dissolved, another similar association had been formed almost immediately thereafter, thereby affirmatively showing that defendants intended and did continue their alleged wrongful acts. This court held the case was not moot and denied the motion to dismiss, but indicated by its decision that same was an exception to the general rule determining moot cases, and further indicated by the following language that its decision should only be used as a precedent in governing similar situations, to-wit:

> "Although the general rule is that equity does not interfere simply to restrain future violation of the law; yet when parties have entered into an illegal agreement and are acting under it, and when there is no adequate remedy at law and the jurisdiction of the court has attached by the filing of a bill to restrain such, or any like action under a similar agreement and a trial has been had, and judgment entered, the appellate juris-

diction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit."

When the lower court rendered judgment in the case at bar, respondent was neither doing nor threatening to do the act sought to be enjoined. If the desire and need of the Administrator to secure a decision of this court on the legality of the contract in question is, itself, a legal reason for keeping a dead case alive; then this case is not moot. Otherwise we respectfully submit that it is now a dead action and should be dismissed.

II.

Was Said Employment Contract of Respondent in Violation of Section 7 of the Fair Labor Standards Act?

This court has recently held in the case of *Walling* v. *Belo Corporation*, (1942) 316 U. S. 624, 62 Sup. Ct. Rep. 1223:

1. The Act does not prohibit employment contracts which pay employees the same weekly wages they received previous thereunto, so long as rates under the new contract equal or exceed the minimum required by the Act;

2. Employer and employee may, by contract, establish the "regular rate" of hourly pay;

3. The Act establishes minimum rates and maximum hours and contracts within those limitations comply with the Act; and

4. The Act does not prohibit a guaranty or loan plan of employment contract by which, in any given work week, employer advances or loans to employe an amount in excess of his pay based upon the regular rate for regular time and time and a half for overtime.

Employment contracts conform with the Act so long as

the base rate equals or exceeds thirty cents per hour and is not paid for more (not less) than forty hours in any work week, and so long as the overtime rate equals or exceeds one and one-half times the base rate and is paid, for not less than all work time in excess of forty hours in any work week. The employer and employee, by contract, can determine the base hourly rate. They may also, by contract, agree upon an arrangement as to rates, (base rates and overtime rates) which will substantially insure and pay the employe the same weekly wage he was receiving prior to the effective date of that Act. In the case at bar the base and overtime rates and weekly work time by which they were to be paid were so determined (within the minimum and maximum limitations of the Act) as would insure payment to the employe of the same regular weekly wage he was receiving before the Act became effective. The contract stipulated a definite, specific, regular base hourly wage far in excess of the statutory minimum; and that overtime should be paid on the basis of one and one-half times said regular rate. It further provided that said regular rate should be paid for one-half of all work time in each work week (not to exceed 40 hours, the maximum permitted by the Act) and that the remaining one-half of said weekly hours should be paid at one and one-half times said regular rate. Under this contract a rotary driller was to be paid on a base hourly rate of $1.10 per hour. On a 56 hour week he would be paid this base wage of $1.10 per hour for 28 hours, which is 12 hours less than the maximum permitted by the Act for payment of base rate; and would receive one and one-half times said rate, or $1.65 an hour, for the remaining 28 hours in said week, which is 12 hours more than the minimum permitted by the Act for payment of overtime rates. It is true that under this contract employee

was receiving the same regular weekly pay he was receiving prior to the Act, but such arrangement is permitted by the Act.

Petitioner makes the same contentions in this case as it made in the *Belo* case. It contends, in effect, that regardless of contract between employer and employee as to the agreed amount of regular hourly time and overtime rates, the regular hourly rates can only be determined by prorating the actual pay which employee receives for the first 40 hours he works in each work week; that the base pay must be paid for the first 40 hours in each work week and not for more, or not for less hours; and that the parties cannot establish the base or regular rate by agreement. This, of course, is contrary to this court's decision in the *Belo* case, in which it specifically held that the parties may, by contract, establish their base or regular rate, and that the Act established limitations only, consisting of minimum rates and maximum hours.

If the petitioner's contention is correct, an employer paying an employee $1.50 an hour before the Act went into effect, would not conform to the Act by thereafter agreeing to pay said employee $2.00 per hour as base hourly rate for the first 30 hours worked in each work week and one and one-half times said base rate, or $3.00 per hour for all hours worked thereafter in said work week; although the base rate was one-third higher than the former rate; the base time was paid for only seventy-five per cent of the maximum permitted by law; and the overtime was paid for ten hours more than the minimum limit of the Act.

Petitioner contends that this contract is not a bona fide contract. It was a written contract, signed by both the employer and employee, and the record contains no facts

which show (other than the contracts themselves) or tend to show that the parties were not bound thereby. Furthermore, the lower court has upheld said contract, and while it did not make a specific finding of fact that same was a bona fide contract, such finding should be presumed if same be necessary to upheld the lower court's decision. The Circuit Court of Appeals, in *Walling* v. *Helmerich & Payne, Inc.* (138 F. (2d) 705, at 706), made the following statement with regard to the bona fides of this contract, to-wit:

> "These contracts were actually entered into; there is no suggestion that the parties failed to understand them; there is no showing that the employees were overreached; and there is nothing in the record to indicate that any other element of fraud attended their execution. They expressly provide in clear and explicit language the regular rates per hour which exceed the minimum rates provided in the Act. Provide that such rates shall be paid for regular hours, which do not exceed the maximum provided in the Act, and provide for overtime at one and one-half times the regular rates for all excess time worked. The company and its employees mutually entered into the respective arrangements, and they do not contravene the exactions of the Act. *Walling* v. *A. H. Belo Corporation, supra.*"

We respectfully submit:

1. That this case is moot and should be dismissed; and

2. That if jurisdiction is retained, this court should find that the decision and judgment of the lower court should be affirmed.

Respectfully submitted,

FRANK SETTLE,
EUGENE O. MONNET,
SAM CLAMMER,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1944.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

vs.

Helmerich & Payne, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 6, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

We are concerned here with the question whether certain provisions of employment contracts relating to the computation and application of regular and overtime wage rates conform to the requirements of Section 7 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060; 29 U. S. C. § 201 *et seq.*

Respondent is engaged in the production of oil and gas for interstate commerce and its employees admittedly are covered by the Act. Prior to October 24, 1938, the effective date of the Act, certain of respondent's employees worked eight, ten and twelve hour daily shifts, or "tours," and were paid a specified wage for each tour. These wages were in excess of the minimum required by the Act, though the number of tours per week would often cause an employee to work more than the maximum hours allowed by the Act without overtime pay being required.

In order to maintain the same wage levels after the Act became effective, respondent made new employment contracts with the employees in question whereby they received their wages under the so-called "Poxon" or split-day plan. This plan arbitrarily divided each regular tour into two parts for purposes of calculating and applying hourly wage rates. The first four hours of each eight hour tour, the first five hours of each ten hour tour and the first five hours of each twelve hour tour were assigned a specified hourly rate described as the "base or regular rate." The remaining hours in each tour were treated as "overtime" and

called for payment at one and one-half times the "base or regular rate." The contracts then recited that the "base rate" set forth "shall never apply to more than 40 hours in any work week."

These so-called "regular" and "overtime" hourly rates were calculated so as to insure that the total wages for each tour would continue the same as under the original contracts,[1] thereby avoiding the necessity of increasing wages or decreasing hours of work as the statutory maximum workweek of 40 hours became effective.[2] Only in the extremely unlikely case where an employee's tours totalled more than 80 hours in a week[3] did he become entitled to any pay in addition to the regular tour wages that he would have received prior to the adoption of the split-day plan. Until more than 80 hours had been worked the plan operated so that the employee could not be credited with more than 40 hours of "regular" work, the remaining time being denominated "overtime." Hence, since the wages under the old system and under the split-day plan were identical, the original tour rates could be used as the simple method of computing wages for each pay period. The actual and regular workweek was accordingly shorn of all significance.

The District Court and the Circuit Court of Appeals both held that the split-day plan of compensation, under the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, did not violate the provisions of Section 7 (a) of the Fair Labor Standards Act. We cannot agree.

Section 7 (a) limits to 40 a week the number of hours that an employer may employ any of his employees subject to the Act, unless the employee receives compensation for his employment in excess of 40 hours at a rate "not less than one and one-half times the regular rate at which he is employed." The split-day plan

[1] Thus the rotary helpers employed by respondent formerly received $7 for each eight hour tour. Under the split day plan, they received a "regular rate" of 70 cents an hour for the first four hours of each tour and an "overtime" rate of $1.05 for each of the remaining four hours. This totalled $7 for the tour.

[2] During the first year after the effective date of the Act the maximum was 44 hours; during the second year 42 hours; and thereafter 40 hours.

[3] For an employee working on twelve hour tours, it was necessary to work at least 96 hours per week before becoming entitled to increased wages under the split day plan.

here in issue satisfies neither the purpose nor the mechanics of this requirement.

As we pointed out in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577-578, the Congressional purpose in enacting Section 7 (a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, see also *Southland Co.* v. *Bayley*, 319 U. S. 44, 48; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. Yet neither objective could be attained under the split-day plan. It enabled respondent to avoid paying real overtime wages for at least the first 40 hours worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment. And the plan was so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate. The statutory maximum workweek of 40 hours was by contract twisted into an 80-hour maximum workweek. No plan so obviously inconsistent with the statutory purpose can lay a claim to legality.

The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by Section 7 (a). While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. *Overnight Motor Co.* v. *Missel*, *supra*. To compute this regular rate for respondent's employees, assuming the same wages and tours, required only the simple process of dividing the [redacted] that tour.[4] This regular rate was then applicable to the first 40 hours regularly worked on the tours and the overtime rate (150% of the regular rate) became effective as to all hours worked in excess of 40.

[4] In this case the weekly wage divided by the number of hours actually worked in the week would have yielded the same regular rate. Under either computation, a rotary helper being paid $7 for each eight hour tour was receiving 87½ cents per hour. This was his regular rate regardless of the number of tours per week. That rate was applicable to the first 40 hours regularly worked, or to the first five tours. For all hours in excess of 40, the rotary helper was entitled to one and one-half times that rate, or $1.31¼. We, of course, express no opinion as to the proper computation of the regular rate under other circumstances. Nor do we intend to indicate that the formula we have used as satisfying the statutory requirements is the only one which respondent could adopt as complying with them.

But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated "overtime" and called for compensation at a rate one and one-half times the fictitious regular rate. Thus when an employee on regular eight hour tours had actually worked 40 hours, respondent could point to the employee's contract and claim that he had worked only 20 "regular" hours and 20 "overtime" hours. Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours. It was derived not from the actual hours and wages but from ingenious mathematical manipulations, with the sole purpose being to perpetuate the pre-statutory wage scale.[5]

It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this

[5] In paragraph 70.4 of Interpretative Bulletin No. 4, as revised in November, 1940, the Administrator expressed his opinion that a plan similar to that of respondent's did not conform to the Act. While this opinion is not binding on the administration of the Act, it does "carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." Overnight Motor Co. v. Missel, 316 U. S. 572, 580-581, n. 17.

case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Nothing in this Court's decision in *Walling* v. *Belo Corp.*, *supra*, sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof.

One final point remains. Petitioner here filed a complaint in the District Court seeking, in part, an injunction to compel respondent to cease its use of the split-day contracts. Two months after the complaint was filed, but before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. The District Court, however, denied the injunction on the merits insofar as the split-day contracts were concerned, and the court below affirmed on a like basis. 138 F. 2d 703. In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. *See Hecht Co.* v. *Bowles*, 321 U. S. 321, 327; *Otis & Co.* v. *Securities and Exchange Commission*, 106 F. 2d 579, 583-584. Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus "an actual controversy and adverse interests," *Lord* v. *Veazie*, 8 How. 251, 255, with a "subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U. S. 378, 390; *St Pierre* v. *United States*, 319 U. S. 41, 42.

We accordingly reverse the judgment of the court below with directions to remand the case to the District Court for further proceedings in conformity with this opinion.